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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T. VENKATADRI.

Kanthammal .. *Appellant**

v.

D. Venkatakrishna Reddiar and others .. *Respondents.*

Res judicata—*Alienation by two persons—Creditor (decree-holder) of one of them filing claim suit against judgment-debtor and vendee from judgment-debtor—Other vendor not a party—Finding in claim suit that sale in not true and in fraud of creditors—Other vendor, meanwhile settling his share in the property conveyed on his daughter-in-law—Subsequent suit by purchaser for declaration of his title—Whether finding in claim suit binding on plaintiff—Suit by a defeated party to the claim suit, if barred by* res judicata.

Held, though in the previous proceedings the Court might have considered only whether the transaction was fraudulent in character, still, the findings rendered in claim suits which ended in second appeals are binding on the plaintiff and the present suit is barred by *res judicata.*

Ramireddi v. *Bichalu*, I.L.R. (1952) Mad. 1005 : (1952) 1 M.L.J. 475, relied on.

Appeal against the Decree of the Court of the Subordinate Judge, Vellore, dated 14th March, 1963, in Appeal Suit No. 374 of 1961, preferred against the Decree of the Court of the District Munsif of Sholinghar, dated 5th September, 1961 in Original Suit No. 37 of 1961.

K. Venkateswara Rao and *N. Sivamani*, for Appellant.

A. Sundaram Iyer, for Respondents.

The Court delivered the following

JUDGMENT.—This appeal is filed by the eighth defendant in a suit for declaration and injunction regarding the suit properties or in the alternative for possession of the same.

The suit properties originally belonged to defendants 1 and 2. The second defendant is the son of the first defendant. Defendants 3 to 7 are the children of the second defendant. The eighth defendant is the wife of the second defendant, and she is the appellant in the second appeal. Defendants 1 and 2, *i.e.*, father and son, mortgaged the suit properties to the plaintiff in the year 1945 for Rs. 2,220.

*S.A.No. 890 of 1963. 19th July, 1967.

To discharge the mortgage, they sold the suit properties to the plaintiff under two sale deeds, Exhibits A-2 and A-3 both dated 7th February, 1949. One creditor of the second defendant filed a suit O.S. No. 31 of 1949 on the file of the District Munsif's Court, Vellore, against the second defendant and obtained a decree against him. In pursuance of the decree obtained in that suit, the creditor attached the suit properties covered by the two sale deeds in favour of the plaintiff. The plaintiff and his alienors filed claim petitions in the execution proceedings which were allowed in their favour. Therefore, the creditor had to file two suits O.S. Nos. 154 and 186 of 1951 on the file of the District Munsif's Court, Sholinghar, to set aside the claim order. These two suits were decreed against the plaintiff. In the decree, the Court gave a finding that the sale deeds Exhibits A-2 and A-3 were not true, and that they were conveyed to defraud the creditors. It was also found that though the properties were conveyed under Exhibits A-2 and A-3, possession continued to be with the second defendant on the date of the attachment and the second defendant had right, title and interest in them. Therefore, the plaintiff and his alienors filed appeal suits, A.S. Nos. 41 and 42 of 1954 on the file of the Sub-Court, Vellore, where the findings of the trial Court were reversed. There were second appeals to this Court in S.A. Nos. 375 and 376 of 1955. The second appeals were allowed, the decision of the lower appellate Court was set aside and that of the trial Court was restored. This Court held that the sale deeds were not genuine and that there was collusion between the plaintiff and the second defendant.

Another creditor filed O.S. No. 472 of 1953 on the file of the District Munsif's Court, Sholinghar, against the first and second defendants. The suit was decreed in favour of the creditor and the plaintiff in that suit allowed the properties to be attached. But defendants 1 and 2 paid the decree amount in the said suit.

Once again defendants 1 and 2 sold the properties to one Chinnappa Naidu on 27th August, 1958. He filed the suit O.S. No. 263 of 1958 on the file of the District Munsif's Court, Sholinghar, against defendants 1 and 2 and the plaintiff for possession. That suit was dismissed. But the finding in that suit was that the sale deeds Exhibits A-2 and A-3 were genuine. During the pendency of that suit, defendants 1 and 2 filed O.S. No. 250 of 1959 on the file of the District Munsif's Court, Sholinghar, for accounts in regard to the income from the suit properties. That suit was also dismissed.

Then the plaintiff filed the present suit out of which the Second Appeal has arisen, in order to clear the cloud in his title as against defendants 1 and 2. Meanwhile, the first defendant had executed a settlement deed of his half share in the suit properties in favour of the eighth defendant, the wife of the second defendant, under Exhibit B-1, dated 29th October, 1953. The first defendant remained *ex parte*. The eighth defendant (appellant) contended that the sale deeds (A-2 and A-3) were nominal transactions. Her main defence to the suit was that it was barred by *res judicata* by virtue of the findings recorded finally in S.A. Nos. 375 and 376 of 1955.

The trial Court found that defendants 1 and 2 were not entitled to claim the suit properties, that the plaintiff had title to the suit properties under Exhibits A-2 and A-3, that the plaintiff was not barred by *res judicata* by reason of the second appellate decrees, and that Exhibits A-2 and A-3 were binding on the defendants by virtue of the decree in O.S. No. 263 of 1958. As far as the eighth defendant was concerned, he held that the settlement deed was not binding on the plaintiff and that the same had also been cancelled by the Insolvency Court as on the date of the settlement deed the first defendant was found to have no title to the suit properties. Finally the suit was decreed in favour of the plaintiff.

Defendants 2 and 8 preferred an appeal to the Sub-Court, Vellore. The learned Subordinate Judge held that the present suit was maintainable as it was not barred by *res judicata* by reason of the decision in the second appellate decrees, that the first defendant had no title to give part of the suit properties on the date of the settlement deed, that the decision rendered in O.S. No. 263 of 1958 did not

operate as *res judicata* against the present plaintiff, that the settlement deed executed by the first defendant in favour of the eighth defendant was invalid and that the plaintiff had been in possession of the suit properties from 1958. In the result, the appeal was dismissed.

Now, it is against this judgment and decree the eighth defendant has preferred this second appeal.

The crucial point for consideration is whether Exhibits A-2 and A-2 executed by defendants 1 and 2 in favour of the plaintiff are nominal and sham and intended to defraud the creditors and whether the findings in the previous proceedings would be binding on the plaintiff.

The validity of the above two sale deeds was the subject-matter of discussion and decision from time to time between the parties. The finding about the sale deeds varied, modified or changed from Court to Court, and the validity and finality of them were not capable of ascertainment. Taking advantage of the varied findings of the various Courts, the plaintiff is interested in asserting that the findings in the previous proceedings wherever they are against him are not binding on him, and equally the appellant is asserting that the present suit is barred by *res judicata* wherever the findings are against the plaintiff. Therefore I have to decide whether the earliest finding recorded in S.A. Nos. 375 and 376 of 1955 which arose out of claim suits is binding on the plaintiff. The findings are that Exhibits A-2 and A-3 are to defraud the creditors, they are nominal and there was collusion. The lower appellate Court is of opinion that the present suit is not barred by reason of the said decision. Learned Counsel for the appellant has contended before me that the above two suits, O.S. Nos. 154 and 186 of 1951, which arose out of execution proceedings, ultimately ended in second appeals, that the findings therein are against the plaintiff and they are therefore binding on the plaintiff. If they are binding, then the present suit will not be maintainable on the ground that it will be barred by *res judicata*.

In *Narasimhachariar* v. *Raghava Padayachi*[1], a Full Bench of this Court had to consider the question whether a finding given in a suit which arose under Order 21, rule 63, was binding on the parties in a subsequent suit. The learned Judges observed :—

> " It is conclusive between the parties to the suit or their representatives so far as the execution of the particular decree is concerned ; but where the property is sold in execution proceedings arising out of an entirely different decree the claimant will not be precluded from setting up his title as against a stranger purchaser. If the attachment has not led to the sale of the property all those concerned, even if there has been a suit under rule 63, will be left in the same position as they were before attachment, except that the decree-holder will be at liberty to institute fresh proceedings in execution of the same decree without any right remaining in the claimant to reagitate his claim. Subject to the operation of the doctrine of *res judicata* in any particular case, we hold that an order on a claim petition filed under Order 21, rule 58, or a decree in a suit filed under rule 63 does not extend beyond the execution of the decree which has given rise to those proceedings."

This principle, no doubt, has been followed by the lower appellate Court, for the purpose of holding that the present suit is not barred by *res judicata*, because the present suit is an entirely different suit not connected with the claim petitions. But learned Counsel for the appellant cited the decision in *Ramireddi* v. *Bichalu*[2], where a Division Bench of this Court had explained the true doctrine in such circumstances. The facts of that case are similar to the facts of the present case. The suit property originally belonged to one Khasim. Subsequent to his death his widow Yelli sold the same for a stated consideration of Rs. 100 to the plaintiff in that suit under Exhibit P-1. A creditor of Yelli filed a suit and obtained a decree.

1. I.L.R. (1946) Mad. 79 : (1945) 2 M.L.J. 89 (F.B.)
2. I.L.R. (1952) Mad. 1005 : (1952) 1 M.L.J 475 : A.I.R. 1952 Mad. 837.

Prior to judgment, the suit property was attached when the plaintiff intervened with a claim based on Exhibit P-1. This claim was allowed which led to the filing of a suit by the creditor for vacating the claim order. In that suit, he impleaded not only the plaintiff (claimant) but the judgment-debtor as well. In that suit, it was decided that the property continued to be that of Yelli despite Exhibit P-1 for the reason that Exhibit P-1 was a sham and nominal transaction and was liable to be attached. After this decision, Yelli sold the property to the defendant in that suit, a portion of which was for discharging the decree debt in the previous suit. The plaintiff who purchased the property filed a suit for declaration of his title and for an injunction restraining the defendant from interfering with his possession. The defence was that the finding that the property continued to be that of Yelli was *res judicata* that Exhibit P-1, was a sham and nominal transaction and would not therefore bind him. The learned Judge referred to the Full Bench decisions and observed :

> " We do not think that the observations in *Narasimhachariar* v. *Raghva Padayachi*[1] lend themselves to the interpretation that in no case will the decision given in a suit under Order 21, rule 63 with reference to title to property would operate as *res judicata* in a subsequent suit.......... It is clear from this statement of law that the learned Judges did not intend to lay down that in no case would the doctrine of *res judicata* apply to a decision given under Order 21, rule 63. The earlier observations must be understood in the light of later statement of law contained in the same judgment and we may take it that the former related to a case where the rule of *res judicata* would have no application, as for instance in a suit instituted by the claimant or by the decree-holder, the judgment-debtor was not made a party and the fight was only between the claimant and the decree-holder. Viewed in that light we think there is no conflict between the two statements of law contained in the same judgment."

This judgment has not been referred to by the lower Courts, and learned Counsel for the appellant contends that, even though the Full Bench has made observations that any finding rendered in a previous suit is final and conclusive in the subsequent suit but yet it does not extend beyond the execution of the decree which has given rise to those proceedings, in an order on a claim petition or a decree in a suit filed under rule 63, the Full Bench did not intend that in no case would the doctrine of *res judicata* apply to a case under rule 63. The statement of law laid down by the Full Bench may not be applicable to the facts of the present case, if we take into consideration the principle laid down in the later decision above referred to.

Learned Counsel for the respondents contended that as far as the first defendant was concerned he was not a party to the claim suits, O.S. Nos. 154 and 186 of 1951 which ended ultimately in second appeals in this Court and that his half share was not the subject-matter in previous proceedings and that further the finding in the said proceedings was about the fraudulent character of the transaction and not that they were sham and nominal. He therefore contended that the principle laid down in *Ramireddi* v. *Bichalu*[2], did not apply to the present case. There may be some force in this contention. But still learned Counsel for the appellant asserted that mere impleading of a new party or adding some more items of property in a later suit will not take away the finality and binding character of the former decision. This proposition of law has been laid down in *Anthony Nadar Mariayanagam Nadar* v. *Vedamanickam Sathianesan*[3].

Learned Counsel for the appellant has next contended that in any event the plaintiff himself was a party to the sale deeds, Exhibits A-2 and A-3 which have been characterised as fraudulent in the previous proceedings and he cannot ask the Court to give him relief on the foot of those transactions. It is true that this plea was not taken in the lower Courts but this was allowed to be taken here as a question

1. I.L.R. (1946) Mad. 79 : (1945) 2 M.L.J. 89 (F.B.).
2. I.L.R. (1952) Mad. 1005 : (1952) 1 M.L.J. 475 : A.I.R. 1952 Mad. 837.
3. (1959) 1 M.L.J. 346.

of law. Their Lordships of the Supreme Court have held in *Immani Appa Rao* v. *G. Ramalingamurthi*[1], that where both the transferor and the transferee are in equal fraud in carrying out the transfer to defraud the creditors of the transferor and the fraud contemplated has been carried out but possession remains with the transferor, in a suit by transferee for possession, it is open to the transferor to plead fraud and absence of consideration. They further hold that public interest requires that the plea of fraud should be allowed to be raised and tried, and if it is upheld the estate should be allowed to remain where it rests. In the previous proceedings, especially in the second appeal it has been found that the sale deeds are not true and genuine. But it was pointed out by learned Counsel for the plaintiff that no issue was framed and no finding had been given by the trial Court. But it must be said that the lower appellate Court had framed it as a point for consideration and given a finding thereon. It is true that if a transaction is sham and nominal, it need not be set aside. Even assuming that there was no issue as to whether the sale deeds are sham and nominal, still it can be construed that those suits have raised two pleas, namely, whether the sale was sham and nominal and whether the sale was in fraud of creditors. In such circumstances, their Lordships of the Supreme Court have held in *Abdul Shukoor* v. *Arji Papa Rao*[2].

> " .... It cannot be said that the defendants did not raise two distinct pleas: (1) that the sale as a sham, a pretended sale without any consideration and not intended to pass any title to the nominal purchaser and in the alternative, (2) that even if it were a real transaction supported by consideration and intended to pass title to the plaintiff, still the same was, having regard to the circumstances stated, a fraud upon the creditors and therefore voidable at his instance. Though the pleading in the written statement was in this form, the issues struck did not raise the two defences as distinct pleas but rolled both of them into a single plea raising the question whether the plaintiff had title to the suit property and whether the claim order was liable to be set aside."

Though in the previous proceedings the Court might have considered only whether the transaction was fraudulent in character, still, applying the principle noted above, I am of opinion that the findings rendered in O.S. Nos. 154 and 186 of 1951 which ended in S.A. Nos. 375 and 376 of 1955 on the file of this Court is binding on the plaintiff, and if it is binding then the present suit would be barred by *res judicata*. But learned Counsel for the first respondent-plaintiff would contend whether the findings rendered in O.S. No. 263 of 1958 and O.S. No. 250 of 1959 where they are in favour of the plaintiff would not bind the appellant herein. But learned Counsel for the appellant would submit that those decrees would not be binding on the appellant since those proceedings commenced against the settlor after the settlement deed was executed in her favour.

Learned Counsel for the appellant contended that, in any event, since the plaintiff had come to Court for declaration and possession, he must prove possession within 12 years of suit. But I do not find any discussion about it in the judgment of the Courts below and no issue has been framed and no finding given. In regard to the other contention by learned Counsel for the first respondent-plaintiff that the settlement deed itself was void, since a coparcener cannot gift away property, learned Counsel for the appellant cited a passage from Mulla's Hindu Law, 13th Edition, page 291, to show that with the consent of other coparceners, a coparcener can make a gift of his interest in the coparcenery property.

The main question that was considered in the Courts below and here also related to whether the findings arrived at in the previous proceedings which ended in second appeals in this Court were binding on the plaintiff in the present suit. Since I have come to the conclusion that those findings are binding on the plaintiff, on the prin-

1. (1962) 2 M.L.J. (S.C.) 101 : (1962) 2 An.W.R. (S.C.) 101 : (1962) 2 S.C.J. 437 : A.I.R. 1962 S.C. 370.

2. (1964) 1 S.C.J. 168 : (1964) 1 M.L.J. (S.C.) 49 : (1964) 1 An.W.R. (S.C.) 49 : A.I.R. 1963 S.C. 1150 at 1153.

ciple laid down in *Ramireddi* v. *Bichalu*[1], the present suit of the plaintiff is barred by *res judicata*. The second appeal is accordingly allowed. There will be no order as to costs.

In view of the complicated facts and continuous proceedings between the parties and the conflicting findings arrived at in them, leave is granted.

S.V.J. ——— *Second appeal allowed; Leave granted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE T. RAMAPRASADA RAO.

S. Kannappa Mudaliar .. *Petitioner**

v.

The State of Madras (represented by the Commercial Tax Officer, Vellore, North Arcot District) .. *Respondent.*

Madras General Sales Tax Act (I of 1959), Item 6 (a) of the Second Schedule—" Oil seeds "—Meaning of—Coconut, if classifiable under " Oil seeds "—Word of common parlance—Meaning to be ascribed.

The only question for determination was whether coconuts are classifiable under oil seeds within the meaning of item 6 (*a*) of the Second Schedule to the Madras General Sales Tax Act, 1959.

Held: It is an accepted canon of law that in interpreting words of common usage appearing in a taxing statute, the meaning which is popular rather than one which is technical has to be adopted. The said test, therefore, to find out the meaning of the word 'coconut' (in a dehusked form) rests on the same as being understood in the manner a common man of society would view it. What was in contemplation of the Legislature when it enacted item 6 (*a*) of the Second Schedule to the Madras General Sales Tax Act, 1959, was to tax the turnover of oil seeds which in common parlance would be taken as oil seeds, but not every seed from which by some process or other oil can be extracted and coconut is therefore not an oil seed.

Petition under section 38 of Madras Act I of 1959 (see rule 30) to revise the order of the Sales Tax Appellate Tribunal, Madras, dated 21st February, 1964 and made in T.A. No. 54 of 1963 preferred against the order of the Appellate Assistant Commissioner (Commercial Tax), Salem, relating to the assessment year 1960-61 in his Appeal No. 30/62-63, dated 12th July, 1962 (MGST. 165/60-61 on the file of the Commercial Tax Officer, Vellore, North Arcot).

C. S. Chandrasekhara Sastry, C. Venkataraman and *G. Subramaniam*, for Petitioner.

K. Venkataswami, for Additional Government Pleader, for Respondent.

The Order of the Court was made by

Ramaprasada Rao, J.—The only question involved in this Tax Revision Case is whether coconuts are classificable under oil seeds within the meaning of item 6 (*a*) of the Second Schedule to the Madras General Sales Tax Act, 1959. The petitioner who was a dealer in dehusked coconuts is disputing the exigibility to tax on a turnover of Rs. 1,74,013-90. The assessee was unsuccessful before the Revenue. The Tribunal, however, considered his contention that coconuts are not oil seeds, but came to the conclusion that they are and incidentally also held that coconuts are not vegetables and therefore not exempt from tax. What was pressed before us is whether the finding of the Tribunal that coconuts are oil seeds is correct and justified. No other point was seriously pressed or argued.

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1. I.L.R. (1952) Mad. 1005: (1952) 1 M.L.J. 475: A.I.R. 1952 Mad. 837.

* T.C. No. 230 of 1964. (Revision No. 156) 21st July, 1967.

The ordinary meaning of the word " seed " is " that which is sown ". Its botanical expansion, according to the Chamber's Twentieth Century Dictionary is, a multicellular structure by which flowering plants reproduce. It is an accepted canon of law that in interpreting words of common usage appearing in a taxing statute, the meaning which is popular rather than one which is technical has to be adopted. The said test, therefore, to find out the meaning of the word 'coconut' (in a dehusked form), rests on the same being understood in the manner a common man of society would view it. The importation of high, skilled, technical and botanical meaning to a word of common parlance would be to cause unnecessary violence to the same and particularly so when the word appears in a fiscal enactment. Tax cannot be the result of intendment, but the produce of express specification. If two interpretations are possible to a word or expression in a taxing statute, the meaning which leans to the benefit of the subject has to be adopted. The word now before us for interpretation is " coconut '. It is not a word which is of a technical or scientific character. It is one which is simple, ordinary and used popularly. The rule to interpret such words of popular import has been well stated by Pollock, B., in *Grenfell* v. *Inland Revenue Commissioners*[1], in the following words :

> " that if a statute contains language which is capable of being construed in a popular sense such statute is not to be construed according to the strict or technical meaning of the language contained in it, but is to be construed in its popular sense, meaning, of course, by the words ' popular sense ', that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it."

But,

> " if a word in its popular sense and read in an ordinary way is capable of two constructions, it is wise to adopt such a construction as is based on the assumption that Parliament merely intended to give so much power as was necessary for carrying out the objects of the Act and not to give any unnecessary powers. In other words, the construction of the words is to be adopted to the fitness of the matter of the statute."

The Supreme Court in *Commissioner of Sales Tax* v. *Jaswant Singh Charan Singh*[2] while explaining the word ' charcoal ' in the Madhya Pradesh General Sales Tax Act, 1958, observed as follows :

> " A sales tax statute, being one levying a tax on goods, must, in the absence of a technical term or a term of science or art, be presumed to have used an ordinary term as coal according to the meaning ascribed to it in common parlance. Viewed from that angle both a merchant dealing in coal and a consumer wanting to purchase it would regard coal not in its geological sense but in the sense as ordinarily understood and would include " charcoal " in the term ' coal '."

Thus the " popular understanding " test prevails over others whilst appreciating the real purport and intent of words used in popular parlance and engaged in a taxing statute. This leads us to the question as to how and in what manner " oil seeds " are understood commonly. Not every seed from which oil can be extracted can be captioned as an oil seed. In these days of scientific advancement and indeed the atomic age, it is possible to conceive that oil can be extracted from any seed by adopting a technical process. It would not be therefore proper to conclude legally that seeds from which oil could be extracted by such adoption of a skilled technical process could be deemed and equated to oil seeds as understood in common parlance. Some seeds, by reason of the application of scientific methods, might produce oil and therefore may be terminologically equated to oil seeds. But the same seeds might not have been understood or applied in the popular sense as oil seeds, because they are incapable of yielding oil as understood commonly. Therefore, it is neces-

1. (1876) 1 Ex.D. 242, 248. at 473.
2. (1967) 2 S.C.J. 197 : (1967) 19 S.T.C. 468

sary that care should be taken in interpreting the word for legal purposes, and particularly under the subject of taxation and while vivifying that word, the popular understanding of it should be rather pressed into service rather than its botanical, scientific or technological signification.

" Oil seeds " is described in the Second Schedule to the Madras General Sales Tax Act, 1959, as a species of declared goods under Item 6 (*a*) thereto. It runs as follows :

> " Oil seeds, other than cardamom and groundnut, that is to say, seeds yielding non-volatile oils used for human consumption or in industry or in the manufacture of varnishes, soaps and the like or in lubrication and volatile oils used chiefly in medicines, perfumes, cosmetics and the like."

A similar description of oil seeds appears in Schedule IV of the Andhra Pradesh General Sales Tax Act, 1957. Chandra Reddy, C.J., and Jaganmohan Reddy, J., interpreting the word " oil seeds" in *State of Andhra Pradesh* v. *Kajjam Ramachandraiah*[1] observed as follows :

> " What was in contemplation of the Legislature when it enacted Item 3 of Schedule IV of the Andhra Pradesh General Sales Tax Act, 1957, was to tax the turnover of oil seeds which in common parlance would be taken as oil seeds, but not every seed from which by some process or other oil can be extracted."

The learned Juges held that coriander, ajwan and sompu are used as spices and are not known as oil seeds and consequently they did not fall within the definition of oil seeds mentioned in Item 3 of Schedule IV. The High Court of Madhya Pradesh is of the view that coconuts are not oil seeds. In *Commissioner of Sales tax* v. *Bakhat Rai & Co.*[2], the learned Chif Justice of Madhya Pradesh High Court, speaking for the Bench, held :

> " Every article or seed which can yield oil is not an oil-seed as contemplated by Item No. 3 of Part II of Schedule I of the C.P. and Berar Sales Tax Act, 1947. The test is not whether oil can be extracted from a fruit or seed, but it is whether in common parlance the article is known as " oil-seed " used principally for the extraction of oil. Judged by this test, it cannot be said that coconuts, groundnuts and jira fall within the meaning of the term " oil seeds " as used in Item No. 3 of Part II of Schedule I to the Act."

The Indian Oil Seeds Committee Act, 1946, is an Act to provide for the creation of a fund to be expended by a committee specially constituted for the improvement and development of the cultivation and marketing of oil seeds and of the production, manufacture and marketing of oil seeds products. Herein also significantly ' coconuts ' are excluded from the definition of 'oil seeds'. Encyclopaedia Britannica, Volume 5, enumerates the uses to which coconuts are applied. It says :

> " The nuts supply no inconsiderable proportion of the food of the natives, and the milky juice enclosed within them forms a pleasant and refreshing drink........ The coconut palm also furnishes very important articles of external commerce, of which the principal is coconut oil. It is obtained by pressure or boiling from the kernels, which are first broken up into small pieces and dried in the sun, when they are known as copra."

Thus an intermediary process of a special nature is required to extract coconut oil. There are other uses of a common nature to this seed. Therefore, it cannot be equated as an oil seed pure and simple.

The Mysore and the Kerala High Courts are however of the view that coconuts are oil seeds. The Mysore High Court in *Kasturi Seshagiri Pai & Co.* v. *Deputy Commissioner of South Kanara*[3], held that the expression " oil-seeds " occurring in section 14 (vi) of the Central Sales Tax Act, 1956, includes coconut and copra. They were,

1. (1961) 12 S.T.C. 795.
2. (1966) 18 S.T.C. 285.
3. (1961) 12 S.T.C. 629 : A.I.R. 1962 Mys. 1.

in fact, considering the power of the Revenue under the Madras Commercial Crops Markets Act, 1933 (as amended later), to impose a levy over and above the prescribed rate for declared goods under the Central Sales Tax Act. Under similar circumstances, the Kerala High Court held that coconuts are oil-seeds. If these judgments were to mean that at all times and for all purposes coconut is an oil-seed we respectfully differ.

We are in agreement with the ratio as set out in the decisions reported in *State of Andhra Pradesh* v. *Kajjam Ramachandraiah*[1], and *Commissioner of Sales Tax* v. *Bakhat Rai & Co.*[2]. In this view of ours that coconut is not an oil-seed, we are unable to sustain the order of the Tribunal which mainly rested its conclusion on that basis. As already stated, the finding of the Tribunal that coconuts are not vegetables was not seriously canvassed before us and it is not necessary for us to deal with it. In view of our conclusion as above that coconuts are not oil-seeds, the order of the Tribunal is set aside in so far as it relates to the subject under discussion, the matter should be remitted back to the Tribunal for fresh disposal of the appeal before it in accordance with law. There will be no order as to costs in this revision case.

V. M. K. ——— *Remitted to Tribunal.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. S. KAILASAM.

Abdul Malick .. *Petitioner**

v.

The Collector of Dharmapuri and others .. *Respondents.*

Madras Cinemas (Regulations) Act (IX of 1955), section 5-A and Rules framed under the Act—Meaning of "interest of the general public"—Same as in section 47 of the Motor Vehicles Act (IV of 1939)—Interest of the Cinema-going public—Certificate of no-objection to site—Grant of—Requirements of the Act and rules to be satisfied—First to come to be granted the certificate.

Board of Revenue—No power to differ from decisions of High Courts—Powers not to be exercised on mere conjectures and surmises.

Precedents—Value of decisions per incuriam.

There is nothing in the Madras Cinemas (Regulation) Act or in the Rules framed thereunder which casts a duty on the Collector or the Board of Revenue to make a selection among several applicants and that the person who applied earlier could be given a no-objection certificate if the requirements of the Act are satisfied. Therefore the petitioner's application being the earlier one and as there was no objection to the site, a no-objection certificate ought to have been granted to the petitioner.

The wisdom of the Legislature in making any law cannot be questioned by the authority (Member of the Board of Revenue). Neither can it go into the correctness of the decision of the High Court. It is in law bound to administer the law as declared and propounded by the High Court. The Member of the Board cannot take upon himself the function of interpreting the law and coming to a different conclusion from that arrived at by the High Court. The fact that the Member of the Board relied on the two judgments *per incuriam* (*i.e.* judgment rendered on hearing only one side), which have no force as precedents, is an error apparent on the face of the record.

The conclusion of the Board that the granting of no-objection certificate to the petitioner would be a source of nuisance was not based on any evidence, but

1. (1961) 12 S.T.C. 795. 2. (1966) 18 S.T.C. 285

* W.P. No. 1153 of 1967. 2nd August, 1967.

only on conjectures and pure surmises. The Member has stated that his observations are to the best of this knowledge and belief. The Member's knowledge and belief is not evidence and cannot be taken into account for coming to a conclusion as to whether a loud-speaker in a given case is a nuisance or not. He also did not take into account the rules relating to the use of loud-speakers by the exhibitors of cinemas which provided that external loud-speakers in any cinema as a source of attraction shall be prohibited and that the sound inside the theatre shall be kept at the optimum level, *i.e.*, really necessary for comfortable hearing and shall not be loud or noisy. After the framing of this rule if any loud-speaker is at a loud tone disturbing others that will be a breach of a condition of the licence and it will result in cancellation of the licence. If the Member was aware of this rule, he would not have complained that the loud-speakers would be really loud, for if it were so, it would result in cancellation of the licence.

The expression " interests of the public " in section 5 (*a*) of the Madras Cinemas (Regulation) Act which is in the same terms as section 47 of the Motor Vehicles Act, has to be given the same meaning, namely, the interest of the cinema-going public.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the Commissioner of Land Revenue and Settlement of Estates, Board of Revenue, Madras, made in B.P.Rt. 2343 (L) and to quash the order, dated 20th April, 1967 and made therein (K. Dis. 3183/66, dated 20th November, 1966 on the file of the Collector, Dharmapuri).

K. K. Venugopal, Advocate, for Petitioner.

T. Selvaraj, for Government Pleader on behalf of Respondents Nos. 1 and 2.

T. Chengalvarayan for *Mrs. T. N. Anantanayaki*, Advocate, for Respondent No. 3.

The Court made the following

ORDER.—This petition is filed for the issue of a writ of *certiorari* calling for the records of the Commissioner of Land Revenue and Settlement of Estates, Board of Revenue, relating to B.P.Rt. 2343 (L) and to quash the order dated 20th April, 1967, made therein

The Petitioner applied to the Collector of Dharmapuri for the grant of a no-objection certificate to locate a touring cinema theatre in S. No. 34/1, in Mallapuram Village on 15th February, 1966. On 16th February, 1966 the third respondent applied to the Collector of Dharmapuri for the grant of no-objection certificate for locating a touring cinema theatre in S. No. 154 in Bommidi Village. The two sites were within the prohibited distance of four furlongs. The application of the petitioner was published on 9th March, 1966 in the notice board of the Collector's Office. On 15th April, 1966 an objection petition was filed by one Michael objecting to the grant of a no-objection certificate to the petitioner on the ground that a Harijan colony was very close to the site chosen by the petitioner and that, if a permit was given to locate a touring cinema theatre, it would cause nuisance. Another objection petition was filed by one Rangan on 24th August, 1966. The Collector made a personal inspection of the sites and on 20th November, 1966 granted a no-objection certificate to the petitioner and rejected the application of the third respondent.

The third respondent preferred appeals to the Board of Revenue, one against the other granting a no-objection certificate to the petitioner and another against the order rejecting his application for the grant of a no-objection certificate. The appeals were heard by the Board of Revenue and it allowed the appeals of the third respondent and granted a no-objection certificate to him and declined to grant a no-objection certificate to the petitioner. The present petition is filed against that order by the petitioner.

Mr. Venugopal, learned Counsel for the petitioner submitted that the order of the Board of Revenue is vitiated by errors apparent on the face of the record. His first contention was that the petitioner's application being earlier in point of time if he could be granted a no-objection certificate it should have been given without any reference to the later application of the third respondent. Secondly, he submitted that the order of the Board of Revenue is vitiated in that the Board misconceived its duties and proceeded to decide a question of law, which was not open to it. Thirdly, he submitted that the Board was in error in relying on the observations of a Bench of this Court and a single Judge of this Court in dismissing two petitions at the admission stage in support of its view, in preference to a decision of a single Judge of this Court rendered after hearing both sides, it was next submitted that the rejection of a no-objection certificate to the petitioner on the ground that it would be a nuisance to the neighbours because of the noise was not based on evidence but purely on surmises.

It is admitted that the petitioner applied to the Collector of Dharmapuri for the grant of a no-objection certificate to locate a touring cinema in S. No. 34/1 in Mallapuram Village on 15th February, 1966, while the third respondent applied only on 16th February, 1966 for a site which is within the prohibited distance. It has been held by a Bench of this Court in *Shanmugham* v. *Arumugham*[1], that there is nothing in the Act or in the rules framed thereunder which casts a duty on the Collector or the Board of Revenue to make a selection among several applicants and that the person who applied earlier could be given a no-objection certificate if the requirements of the Act are satisfied. The learned Judges held that,

> " In such a case it is not unreasonable to reject the application of the respondent who applied later, giving him liberty to file another application for a site which is not within the prohibited distance."

The learned Judges also took an instance of two applications for the issue of no-objection certificates made by two persons on the same date for sites which lie within the prohibited distances from each other and observed that

> " In such a case it may be that the Collector will make a selection, or he may send for both the applicants and ask them to modify their application in respect of situation of the sites."

This decision has been followed by this Court in *A. Govindan* v. *P. V. Vijayaraju Chetti and two others*[2] and *T. R. Raju* alias *Ramaswamy* v. *P. Ramaswamy and two others*.[3] The petitioner's application being the earlier one and as there was no-objection to the site, a no-objection certificate ought to have been granted to the petitioner.

The next contention of the learned Counsel for the petitioner is that the Board was in error in arrogating to itself the function of determining a question of law which had been decided by the High Court, and thereby the order is vitiated by an error apparent on the face of the record. In paragraph 7 of its order the Board has stated as follows :—

> " I must observe with great respect, that there can be no parallel or comparison between the Motor Vehicles Act and the Madras Cinemas (Regulation) Act. Motor vehicles and stage carriage and transport vehicles ply on ' established roads and on authorised routes only'. "

The Board proceeded to consider the difference, which according to it, existed between the Motor Vehicles Act and the Madras Cinemas (Regulation) Act. Later, in paragraph 8 of its order the Board referred to the definition of the word ' nuisance' in the Madras Public Health Act and expressed its view that

> " a travelling cinema and the type of equipment it used operating in close proximity to the human habitations will be a source of disturbance to the peace

1. I.L.R. (1959) Mad. 576 : (1960) M.L.J. (Crl.) 44 : (1960) 1 M.L.J. 66 at 73.
2. W.P. No. 3999 of 1965.
3. W.P. No. 650 of 1966.

and sleep of the neighbourhood almost up to midnight or even later, in the night."

The Board concluded thus:

> "As a public authority, I am bound by the interpretation of statutes by the High Court. But I find it difficult to accept the proposition that it is open to one public authority in administering a law to act in such a manner as to create unbridled public nuisance to the area in which the travelling cinema is located. Administration will be exposed to public ridicule if one authority grants a licence for a cinema and another authority promptly starts on injunction proceeding against the cinema on grounds of public nuisance under the Madras Public Health Act, 1939. So far as I am aware the provision of the Madras Cinema (Regulation) Act, 1965 do not supersede the provisions of the Madras Public Health Act, 1939."

The above observations justify the attack on the order that the Member of the Board entirely misconceived his duties. The wisdom of the Legislature in making any law cannot be questioned by the authority. Neither can it go into the correctness of the decision of the High Court. It is in law bound to administer the law as declared and propounded by the High Court. The passages extracted above clearly show that the Member of the Board took upon himself the function of interpreting the law and coming to a different conclusion from that arrived at by the High Court. The observation that

> "as a public authority I am bound by the interpretation of a statutes by the High Court, but I find it difficult to accept the proposition... ...."

is highly improper and objectionable.

Mr. Chengalvarayan, learned Counsel for the respondent, submitted that he could not support the conduct of the Member in arrogating to himself the function of deciding a proposition of law which had been laid down by the High Court and stated that the attitude of the Member of the Board is inexcusable and regrettable. The learned Government Pleader on behalf of the State submitted that he could not support the procedure adopted by the Member of the Board of Revenue. It is distressing to note that the tribunal which arrogated to itself functions wholly alien to its jurisdiction happens to be a Member of the Board of Revenue.

Mr. Chengalvarayan, learned Counsel for the respondent submitted in extenuation of the error of the Member of the Board of Revenue that the Member was not aware that the observations made by the High Court while dismissing petitions at the time of admission is not entitled to be followed as precedents. This may be so and it would have been understandable if the Board merely followed the observation of the Bench of the single Judge.

In support of its view, the Board relied on the observations of a single Judge of this Court in *Sangu Ganesan* v. *M. Asarias and two others*[1], and of the Bench in *Sangu Ganesan* v. *M. Asarias and two others*[2]. W.P. No. 1356 of 1966 was dismissed at the admission stage. In dismissing it the learned Judge observed that the test applied in that case appeared *prima facie* to be a valid test in connection with the grant of a cinematographic licences. The test referred to is the test relating to the interests of the public. In *Sangu Ganesan* v. *M. Asarias and two others*[2] the Bench dismissed the above writ petition, making certain observations. Both these decisions were rendered at the admission stage and the other side was not heard.

In section 27 at page 155 of Salmond on Jurisprudence (12th Edition) the rule is stated thus:

> "If one looks at this question merely with the eye of common sense, the answer to it is clear. One of the chief reasons for the doctrine of precedent is that the matter that has once been fully argued and decided should not be allowed to

1. W.P. No. 1356 of 1966. 2. W.A. No. 228 of 1966.

be reopened. Where a judgment is given without the losing party having been represented, there is no assurance that all the relevant considerations have been brought to the notice of the Court, and consequently the decision ought not to be regarded as possessing absolute authority, even if it does not fall within the *sub-silentio* rule."

In *Rex* v. *Charles Leslie Norman*[1], the Court of Criminal Appeal was of the view that a decision was not entitled to great weight as " the prisoner was not represented, and no argument whatever was addressed to the Court by Counsel on his behalf. In *Nicholas* v. *Penny*[2], it is observed that a case which has not been argued on both sides has nothing like the weight of authority of one which has been fully argued. A Full Bench of the Nagpur High Court in *Kanglu Baula* v. *Chief Executive Officer*[3] stated the position thus :

" No doubt, the petitioner's Counsel did address an argument before the Court, but it must be borne in mind that argument addressed at motion hearing is rarely full particularly when the question is intricate or is an unusual one ....It must therefore be said that the decision on the point was given by the learned Judges *per incuriam.* When a decision is given by a Court *per incuriam,* it is not binding on a subsequent Court."

Whatever may be the value of a judgment rendered without hearing arguments in full when parties are present, judgment rendered without notice or in the absence of the contesting party will not be entitled to any weight as a precedent. In cases when petitions are dismissed at the admission stage, the respondent is not present and has no opportunity to put forth his case. Admittedly, whatever observations may be made they will not bind the respondent and the judgment cannot be a precedent, because it is a judgment rendered on hearing only one side. It will be a judgment *per incuriam.* It may be that the Member of the Board was not aware of this position of law. But the fact that he has relied on the observations in the two decisions, which have no force as precedents is an error apparent on the face of the record. The only decision rendered after hearing both sides which was quoted before the Board was the one in *Panjathi Sambandam* v. *A. V. Nataraja Mudaliar and two others*[4] and the Board ought to have followed that decision.

The order of the Board is attacked on the ground that its conclusion that the granting of a no objection certificate to the petitioner would be a source of nuisance was based purely on surmises. In Paragraph 8 of its order the Board observed as follows :—

" Apart from this, it is a public fact that the travelling cinemas operating under thatched roofing or under tents, or under corrugated sheets, or asbestos cement sheets are not sound proof and cannot be sound proof."

This observation is not based on any evidence and whatever impression the Member of the Board might have on the subject, he should not have allowed it to colour the decision in the case. Proceeding the Board observed :

" The loud-speakers used in such travelling cinemas are really loud. Any attempt made to reduce the volume of sound below the level at which it would not be an assault on the ear drums of the people in the neighbourhood is just not possible because the loud-speaker goes dead long before the level (or tuning down to that level) is achieved."

This again is not based on evidence, but on mere conjecture. The Member proceeded to observe :

" To the best of my knowledge and belief, no travelling cinema utilises expensive loud speakers by which the tone may be modulated to just the level and cadence and fidelity of ordinary human speech. This type of loud-speaker is

1. L.R. (1924) 2 K.B. 315 at 322.
2. L.R. (1950) 2 K.B. 466 at 472.
3. A.I.R. 1955 Nag. 49 at 64.
4. W.P. No. 1848 of 1966.

expensive and it will also be not possible to insist on, (because of) their non-availability in sufficient numbers."

This is not based on any evidence, but only on conjectures and pure surmises. The Member has stated that the observations are to the best of his knowledge and belief. The Member's knowledge and belief is not evidence and cannot be taken into account for coming to a conclusion as to whether a loud-speaker in a given case is a nuisance or not. The Supreme Court has discouraged the tribunals coming to conclusions on surmises. In *Omar Salay Mohd.* v. *I. T. Commissioner*[1] the Supreme Court pointed out thus :—

> "The conclusions reached by the Tribunal should not be coloured by any irrelevant considerations of matters of prejudice and if there are any circumstances which required to be explained by the assessee, the assessee should be given an opportunity of doing so. On no account whatever should the Tribunal base its findings on suspicions, conjectures or surmises nor should it act on no evidence at all or on improper rejection of material and relevant evidence, or partly on evidence and partly on suspicions, conjectures or surmises and if it does anything of the sort its findings even though on questions of fact will be liable to be set aside by this Court."

This view was again reiterated by the Supreme Court in *M/s. L. B. Ambica Ram* v. *I. T. Commissioner*[2].

The Board did not take into account the rules relating to the use of loud-speakers by the exhibitors of cinemas. By G.O. No. 1403, dated 21st April, 1965, rules were framed which provided that external loud-speakers in any cinema as a source of attraction shall be prohibited and that the sound inside the theatre shall be kept at the optimum level. *i.e.*, really necessary for comfortable hearing and shall not be loud or noisy. After the framing of this rule if any loud-speaker is kept at a loud tone disturbing others, that will be a breach of a condition of the licence and it will result in cancellation of the licence. If the Member was aware of this rule, he would not have complained that the loud-speakers would be really loud, for if it were so it would result in cancellation of the licence.

On the merits also, the conclusion arrived at by the Board cannot be accepted. The two objections that were raised to the grant of a no objection certificate by the public were that the site was very close to a church and that the cinema going public were likely to molest the people in the Harijan Cheri. Both the objections were not accepted by the Collector. The Board of Revenue, apart from referring to the order of the Collector dealing with the likely molestation by the cinema going public, has not given any finding on this aspect. The entire order is based on the ground that the loud-speakers would be really loud and that the neighbours would be disturbed. This conclusion cannot be accepted.

It is contended by the learned Counsel for the petitioner that the right to object is given to the public under Rule 106 (*a*) if the objection is preferred within 15 days of the notification, and the ground of objection is non-compliance of the rules framed under the Act. It is submitted that the objection put forward by the public was after the expiry of 15 days, and not on the ground of non-compliance of the Rules. I do not think that this point need be considered, as any relevant objection can be taken into consideration by the authority issuing the licence, whether it is brought to his notice by way of objection from the public, or otherwise.

Mr. Chengalvorayan, learned Counsel for the respondent submitted that the view taken by this Court that in section 5 (*a*) of the Madras Cinemas (Regulation) Act the words 'interest of the public generally' should be construed as the interest of the cinema-going public requires reconsideration. Learned Counsel brought to my notice the decision of this Court in *Padmanabhan* v. *The State*[3], where Raja-

1. A.I.R. 1959 S.C. 1238 at 1251.
2. (1959) S.C.J. 292 : A.I.R. 1959 S.C. 1295.
3. I.L.R. (1956) Mad. 1272 : (1956) 1 M.L.J. 170 : A.I.R. 1956 Mad. 349.

gopalan, J., took the view that the interest of the public generally as used in section 47 (1) of the Motor Vehicles Act was comprehensive enough to cover the interest of the public generally besides the interest of the travelling public. The decision of a Bench of this Court in *Sri Rama Vilas Service* v. *Road Traffic Board*[1], was not brought to the notice of the learned Judge. In this decision a Bench of this Court has held that the expression 'interests of the public' which is found in the Motor Vehicles Act relates to the interests of the travelling public, for whose convenience and need stage carriages are provided. This decision has been followed by the Calcutta High Court in *Onkarmal* v. *R. T. Authority*[2]. Agreeing with the view of the Bench of the Madras High Court the Calcutta High Court pointed out that

> "the interest of the public as mentioned in the Act cannot include matters which have nothing to do with the interests of the public which was going to use the motor vehicles in question."

A full Bench of the Allahabad High Court in *Moti Lal* v. *Uttar Pradesh Government*[3], followed the decision of the Bench of the Madras High Court in *Sri Rama Vilas Service* v. *Road Traffic Board*[1]. The Kerala High Court in *V. T. Corporation* v. *S. T. A. Tribunal*[4], has also taken the same view. Thus the law as laid down by the Bench of the Madras High Court in *Sri Rama Vilas Service* v. *Road Traffic Board*[1], has been accepted and followed by the various Courts mentioned above. In their view, the contention that the words "interests of the public" should be considered as meaning the public at large and not the travelling public alone cannot be upheld. Section 5 of the Madras Cinemas (Regulation) Act is in the same terms as section 47 of the Motor Vehicles Act, and Mr. Changalvarayan has unable to convince me that the words the interest of the public generally in section 5 (*a*) of the Madras Cinemas (Regulation) Act should be given a different meaning from the words interests of the public found in section 47 (1) of the Motor Vehicles Act.

Mr. Chengalvarayan referred to two decisions of American Courts, in *Federal Communications Commission* v. *Sanders Brothers Radio Station*[5], and in *National Broadcasting Co.* v. *United States*[6]. The passages relied on by the learned Counsel would indicate that the facts to be taken into consideration were the interests of the public listening to the broadcasts. The decisions do not help the contentions of the learned Counsel. I see no reason for revising my view that the words 'the interest of the public generally' in section 5 (*a*) of the Madras Cinemas (Regulation) Act would refer only to the interests of the cinema-going public.

In the result, the writ petition is allowed with costs. Counsel's fee Rs. 100.

V.M.K. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE T. RAMAPRASADA RAO.

The Firm of Mahadeva Rice and Oil Mills by partners .. *Petitioners**

v.

Chennimalai Gounder .. *Respondent.*

Civil Procedure Code (*V of* 1908), *Order* I, *rule* 10—*Impleading a third party to the suit—Governing principle—Avoidance of multiplicity of suits—The proposed party to have a defined, subsisting, direct and substantive interest in the litigation—Adding of a party not a ruse to ventilate the inexpedient and unnecessary grievances of parties.*

The plaintiff (respondent herein) filed a suit against the co-owners of the mills for the partition of his share which he had purchased from one *P*. The co-owners (the petitioners herein) contended by saying that the

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1. (1948) 1 M.L.J. 85 : A.I.R. 1948 Mad. 400.
2. A.I.R. 1956 Cal. 490.
3. A.I.R. 1951 All. 257.
4. A.I.R. 1961 Ker. 77.
5. 84 L. Ed. 869.
6. 87 L. Ed. 1344.

* C.R.P. Nos. 1342 and 1343 of 1965. 16th December, 1966.

mill is a partnership property and that a suit for partition is not maintainable, during the continuance of the partnership. While the suit was pending, the petitioners filed a suit against the respondent praying for an injunction restraining the respondent from trespassing into the rice mill premises and interfering with the business of the petitioners. The respondent took out an application in each of the suits for impleading the vendor as a party to both the suits. This was resisted by the petitioners. The vendor was impleaded as a proper party under Order 1, rule 10, Civil Procedure Code. Hence the revision petitions.

Held : Under Order 1, rule 10, Civil Procedure Code, (1) if, for the adjudication of the 'real controversy' between the parties on record, the presence of a third party is necessary, then he can be impleaded; (2) it is imperative to note that by such impleading of the proposed party, all controversies arising in the suit and all issues arising thereunder may be finally determined and set at rest, thereby avoiding multiplicity of suits over a subject-matter which could still have been decided in the pending suit itself; (3) The proposed party has a defined subsisting, direct and substantive interest in the litigation which interest is either legal or equitable and which right is cognisable in law; (4) Meticulous care should be taken to avoid the adding of a party if it is intended merely as a ruse to ventilate certain other grievances or one or the other of the parties on record which is neither necessary nor expedient to be considered by the Court in the pending litigation; and (5) It should always be remembered that considerable prejudice would be caused to the opposite party when irrelevant matters are allowed to be considered by Courts by adding a new party whose interest has no nexus to the subject-matter of the suit.

On the basis of these principles it has to be held that the proposed party namely the vendor cannot be added as a regular party to the suit.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Sub-Court, Erode dated 17th July, 1965 in I.A. Nos. 269 and 975 of 1964 in O.S. No. 164 of 1963, etc.

T. R. Ramachandran, for Petitioner.

K. Sarvabhauman, for Respondent.

The Court made the following

ORDER.—The petitioners in both the Civil Revision Petitions are the same. The petitioners were the co-owners of a rice mill known as Mahadeva Rice and Oil Mills, along with one Palaniappa. The said Palaniappa sold his moiety of his share to the respondent. The respondent alleged that he is a co-sharer in the said mills and on that basis filed O.S. No. 164 of 1963 on the file of the Court of the Subordinate Judge, Erode, for a partition of the mills and for separate possession of his share. The petitioners filed their written statement contending *inter alia* that the mill is a partnership property and that a suit for partition is not maintainable, during the continuance of the partnership. Whilst this suit was pending, the petitioners filed a suit O.S. No. 520 of 1963 in the District Munsif Court, Erode, against the respondent and prayed for an injunction restraining the respondent from trespassing into the rice mill premises and interfering with the business of the petitioners. The suit was transferred to the Subordinate Judge's Court, Erode, and now bears O.S. No.151 of 1964. After the pleadings in both suits were complete, the respondent took out an application in each of the suits pending in the Sub-Court, Erode, for impleading his vendor Palaniappa Chettiar as a party to both the suits. His contention was that his vendor was both a necessary and a proper party to the suit having regard to the allegations in the pleadings. This was resisted by the petitioners. The lower Court allowed the application and ordered that Palaniappa Chettiar has to be impleaded though not as a necessary party, but as a proper party under Order 1, rule 10, Civil Procedure Code. The two Civil Revision Petitions are directed against each of such orders in the two suits.

A proper party is one without whose presence the question in the suit cannot be completely and effectually adjudicated upon. If he is neither a necessary party nor a proper party, the Court has no jurisdiction to add him as a party. Now that the lower Court has held that the vendor of the plaintiff is not a necessary party, it is for consideration whether he is a proper party. If he is not, the lower Court erred in exercising jurisdiction which it has none by impleading the vendor, and its order would be therefore subject to my revisional jurisdiction.

It is an essential pre-requisite for one to be made a party that he should have a subsisting interest in the subject-matter of the suit. Ramamurthi, J., had occasion to consider exhaustively the implications of Order 1, rule 10, Civil Procedure Code, in *Krishnamachari* v. *Dhanalakshmi Ammal*[1]. The learned Judge observed that the interest that is necessary to make a person a party is legal interest including equitable interest, that is, an interest which law would recognise and uphold. Thus, the *sine qua non* for any person being impleaded to an already pending *lis* is that he or she should have a direct or tangible interest in the subject-matter. A mere convenience or benefit which might possibly result to a party applicant by adding another party to the pending suit is not the test to be applied. Avoidance of multiplicity of legal proceedings is no doubt a salient rule. Such avoidance must be in relation to the *lis* in question and cannot embrace all possible conceivable litigation that the parties may indulge in later which are totally unconnected with the main issues in the suit. An other infallible test is that a new party can be added in order to decide all questions arising in the suit or involved in the suit. If therefore such questions can be decided without the proposed party, the judicial discretion vested in Court to implead parties under Order 1, rule 10 (2), Civil Procedure Code, ought not to be exercised ; if so exercised, it would amount to a patent exercise of jurisdiction when it is not there. In *Razia Begum* v. *Anwar Begum*[2], their Lordships of the Supreme Court held that the interest which the proposed party shall have in the suit to enable him to be impleaded therein, should be a direct interest and not a commercial interest. What is sought to be done in this case is that the plaintiff who has instituted a suit for partition of the suit property which is alleged to be in the joint possession of the respondent and the petitioners, applied for impleading his vendor who was originally the co-sharer in the property along with the petitioners. It cannot be said that without the presence of the vendor of the plaintiff the issues arising in the suit all questions involved therein cannot be decided satisfactorily. No question of avoidance of multiplicity of suit arises. The vendor has neither a direct nor commercial interest in the *lis*. It is significant to note that the petitioners are not disputing the sale or the share of the plaintiff in the suit property consequent upon such a sale. Indeed, no relief is asked for against the proposed party.

In such circumstance, the main question that arises for determination is whether the vendor of the respondent who has been directed to be added as a proper party by the lower Court can be considered to have been so added legally. In *In re, Ibrahim Haji*[3], Ramaswami, J., held as follows :

> "Order 1, rule 19 (2), Civil Procedure Code, confers wide discretion to the Court to meet every case of defect of parties but is subject to two limitations, *viz.*, (1) that the Court has no power to join a person as a party if he could not have been originally impleaded under Order 1, rule 1 or rule 3, Civil Procedure Code, and (2) that the presence of the person added must be necessary to effectually and completely adjudicate upon and settle all points involved in the suit if persons who are sought to be impleaded have no subsisting right over the properties and and they are sought to be impleaded only, for the purpose of getting their evidence, and it would not be proper to make them parties to the suit and that the petitioner's

1. I.L.R. (1966) 2 Mad. 78 : (1966) 2 M.L.J. 298.
2. (1958) S.C.J. 1214 : (1958) 2 M.L.J. (S.C.) 193 : (1958) 2 An.W.R. (S.C.) 193 : (1959) S.C.R. 1111.
3. (1957) 1 M.L.J. 167 : A.I.R. 1957 Mad. 699.

apprehension that they would be driven to the necessity of filing a separate suit against these persons is not a sufficient justification to compel the plaintiff to implead them as parties to the suit."

No doubt, the above case was a case in which the defendant wanted to implead a third party as an additional party to the suit. But the principles will equally apply even in the case where the plaintiffs ask for impleading a third party as an additional party defendant. One other ground that is urged before me is that such impleading of the proposed party is necessary to avoid multiplicity of suits. The essence of the test of multiplicity of suits lies in the appreciation of facts and circumstances of each particular case. O.S. No. 164 of 1963 is a suit instituted by the respondent for a partition of the oil mills as on the foot of a purchase of an undivided a moiety in such mills by him from his predecessor-in-interest who is proposed to be added as a party. O.S. No. 520 of 1963 originally instituted in the Court of the District Munsif of Erode is a suit filed by the petitioners for an injunction against the respondent restraining him from interfering with their business. In this state of affairs, it is not easy to comprehend as to what possible suit in the future as between the parties to the two suits can be avoided by impleading the predecessors-in-interest of the respondent herein as party to the suit. It may be that there may be controversies and there may be rights and liabilities *inter se* between the respondent and his vendor. But the adjudication of such disputes or a reference to it in the present suits would be alien to the scope of the suits. As pointed out by Mukherji, J., in *Nrisinga Prasad* v. *Steel Product Ltd.*[1], it is only for the purpose of the adjudication of the "real controversy" between the parties that a Court might exercise its judicial discretion and add a third party to the suit, so that in consequence thereof multiplicity of suits can be avoided. Mukherji, J., in the above suit was considering the question of amendment of pleadings. He held that the governing consideration in an application to amend the pleadings should be confined to the determination of the "real controversy" between the parties. If that test is not satisfied then the amendment should not be allowed even on the ground that there can be no real prejudice by the amendment and that the costs awarded against the amending party will act as the panacea for any possible inconvenience occasioned by the amendment. There is always legal prejudice where irrelevant matters are allowed to be introduced by amendment. The learned Judge adds that "the real controversy" test is the basic test which governs the Court's unchartered powers of amendment of pleadings. This had been put as the cardinal test as well. This test which has been applied for amendment of pleadings, does also to a certain extent apply to in the case of adding of parties as well. No amount of assertion on the part of the parties to a *lis* to the effect that it would avoid multiplicity of suits that it would be convenient for purposes of trial, that it would not cause prejudice to any party, would be of any avail. If the cardinal test, namely, for a final adjudication of the "real controversy" such addition is necessary, is not satisfied, then it cannot be said with any reasonable certainty that the proposed part is a proper party. I am of the opinion that the following test may be formulated usefully as a guidance in the case of adding of parties. Under Order 1, rule 10, Civil Procedure Code, (1) If, for the adjudication of the "real controversy" between the parties on record, the presence of a third party is necessary, then he can be impleaded ; (2) It is imperative to note that by such impleading of the proposed party, all controversies arising in the suit and all issues arising thereunder may be finally determined and set at rest, thereby avoiding multiplicity of suits over a subject-matter which could still have been decided in the pending suit itself; (3) The proposed party has a defined subsisting, direct and substantive interest in the litigation, which interest is either legal or equitable and which right is cognisable in law, (4) Meticulous care should be taken to avoid the adding of a party if it is intended merely as a ruse to ventilate certain other grievances of one or the other of the parties on record which is neither necessary nor expedient to be considered by the Court in the pending litigation ; and (5) It should always be

1. A.I.R. 1953 Cal. 15.

remembered that considerable prejudice would be caused to the opposite party when irrelevant matters are allowed to be considered by Courts by adding a new party whose interest has no nexus to the subject-matter of the suit.

In the light such judicial precedents and the principles laid down above I do not see any justification for the proposed party herein being added as a regular party. I do not agree with the observations of the Subordinate Judge that the proposed party is a proper party. I have already given my reasons. If the proposed party is not a proper party, the Court has no jurisdiction to add him as a party to the suit. Therefore, there is an error apparent in the judgment of the lower Court. I therefore set aside the order of the Subordinate Judge who directed that the party proposed by the respondent be added as a regular party to the suit. The revision petition is allowed, but in the peculiar circumstances of this case, there will be no order as to costs.

V.M.K. — *Revision Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

Syed Mustafa Peeran Sahib and another .. *Petitioners**

v.

The State Wakf Board represented by its Secretary, 3, Santhome High Road; Mylapore, Madras-4. .. *Respondent.*

The Muslim Wakf Act (Central Act XXIX of 1954), sections 3 (f) and 6—Property declared and registered an wakf property—Aggrieved party not availing remedy provided under section 6—Effect of—Resort to remedy under Article 226 cannot be permitted—Meaning of word "Kairathi."

Where the statute itself provides for the appropriate remedy for relief by resort to the ordinary Courts of the land, within a specified period of limitation prescribed for that purpose and also provides that in the event of failure to resort to these steps, the decision of the Wakf Board shall be final, (section 6), the petitioners having failed to avail themselves of the remedies under the Act within the time allowed under the statute, cannot be permitted to agitate the same issue over again in writ proceedings.

It was further held that, the definition of Muthavalli in section 3 (f) of the Act will include a person who for the time being manages or administers wakf property as such. The petitioners who are admittedly managing the wakf property and performing the service of feeding poor fakirs, cannot challenge the demand for contribution made against them, on the ground that they have not admitted the wakf nature of the properties.

The word "Kairathi" can also include lands given as charitable endowments to or by Mohammadans.

W.P. No. 833 *of* 1964 :—Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the State Wakf Board, Madras to forbear from in any way interfering with the petitioner's possession and enjoyment of the property (*viz.*,) 7.97 Acres of Punja lands bearing S. No. 135 and portions of S. Nos. 134, 113, 159, 160, 166, 174, and 175 in Patta No. 247 in Naduhalli Village, Dharmapuri Taluk, Salem District more particularly mentioned in the Registers as "Kairathi Personal Inam" as full owner.

W. P. No. 1048 *of* 1965 :—Petition praying that in the circumstances stated therein and the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the State Wakf Board, Madras-4, to forbear from taking

* W.P. Nos. 833 of 1964 and 1048 of 1965. 6th January, 1967.

any action under the Muslim Wakf Act (Central Act XXIX of 1954) in respect of the properties of the petitioner herein mentioned below :—

Description of the properties.

Nanja and Punja lands in Patta No. 247 in Naduhalli Village Dharmapuri Taluk, Salem District.

S. No.	*Particulars of lands.*	*Extent.*	*Theerva.* Rs. P.	
108	Punja	1-5	0-91	
110	,,	1-34	1-84	
111	,,	2-88	3-95	
112	,,	2-25	3-8	
113	,,	4-33	5-93	(Portion)
114	,,	2-22	3-4	
115	,,	1-38	1-89	
116	,,	2-58	3-53	
117	,,	3-59	7-18	
118-1	,,	2-17	4-34	
132	,,	2-31	4-62	
133	,,	3-92	7-84	
134	,,	2-8	2-85	(Portion)
135	,,	1-83	2-51	
136	,,	2-90	3-97	
137	,,	1-80	2-47	
151	,,	3-40	4-66	
152	,,	3-94	5-40	
153	,,	1-10	1-51	
154	,,	3-40	4-66	
155	,,	3-95	5-41	
156	,,	3-15	6-30	
157	,,	3-30	6-60	
158	,,	4-49	8-98	
159	,,	2-2	4-4	(Portion)
160	,,	2-24	1-95	
161	,,	1-60	1-39	
165	Nanja	1-82	5-00	
166	,,	2-50	6-88	(Portion)
167	Punja	1-75	3-50	
168	,,	2-18	4-36	
169	,,	2-90	5-80	
170	,,	2-2	4-4	
171	,,	3-13	4-29	
172	,,	2-86	5-72	
173	,,	3-40	6-80	
174	,,	3-45	6-90	(Portion)
175	,,	2-90	5-80	(Portion)

T. R. Srinivasan, Advocate, for Petitioner (In both the petitions).

M. A. Satha Sayeed, Advocate for Respondent (In both the petitions).

The Court made the following

ORDER.—In these two petitions the prayer is for the issue of a writ of *mandamus* under Article 226 of the Constitution restraining the respondent, Secretary of the State Wakf Board, Madras to forbear from taking any action under the Muslim Wakf Act (XXIX of 1954), in regard to the levy of contribution under the aforesaid Act for the properties mentioned in the schedule to the petitions.

The petitioners contend that in Naduhalli Village, Dharmapuri Taluk, Salem District there is a certain extent of land which has been entered in the village accounts as Kairathi Personal Inam. This property had been enjoyed by the petitioners and their predecessors-in-title for over hundred years as their personal property. The properties are not attached to any mosque or religious or charitable Muslim institution; nor was there at any time a dedication in respect of them permanently or otherwise by any person. Nevertheless, the respondent Secretary of the Wakf Board, called upon the petitioners to render accounts on the footing that the properties are wakf properties and had been so registered under the Wakf Act and contributions are liable to be paid in respect of them to the Wakf Board. The petitioner in Writ Petition No. 833 of 1964 alleged that he was not aware of any enquiry by the Board before they declared the properties to be wakf properties. On the other hand the petitioner in Writ Petition No. 1048 of 1965 stated that he had made certain representations in writing to the respondent Board pointing out that the properties were not wakf properties and that he was not the Muthavalli of any such wakf. Both the petitioners urged that the properties have never been in the nature of wakf and that the respondent Board, acted entirely without jurisdiction in proceeding to demand contribution under the Wakf Act from the petitioners.

In the counter-affidavit filed by the respondent, Secretary of the Wakf Board, it is alleged that there was a detailed enquiry as prescribed in section 4 of the Wakf Act conducted by the Assistant Commissioner of Wakfs, Salem. During that enquiry the petitioner in Writ Petition No. 1048 of 1965 represented that the land was granted by Nawab Tippu Sultan and that it was to be used for feeding Fakirs at the time of Meela-de-Nabi and Giarween Urs, that he and the other beneficiaries were doing so every year spending about Rs. 400 for the purpose; that they had divided the lands into 17 parts and were enjoying the same and that the annual income ordinarily from the lands would be Rs. 5,000. On the basis of the Assistant Commissioner's report the lands were included in the list of wakfs and the list was published in the Fort St. George on 29th April, 1959. It is alleged in the counter-affidavit that if the petitioners were aggrieved by such a declaration in the notification, they should have agitated the matter by filling a suit within the time prescribed in section 6 of the Central Wakf Act, and having failed to do so, it is not open to them in these writ proceedings to contend that the properties are not wakf properties and that they were not liable to meet the demand for contribution.

Learned Counsel Sri T. R. Srinivasan appearing for the petitioners urged as a question of fact that the available data in the case will serve to establish that the properties are not wakf properties at all, as defined in section 3 (1) of the Act. According to the definition in section 3 (1) wakf means the permanent dedication by a person professing Islam of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes a wakf by user. Learned Counsel refers to the entries in the inam settlement register for the lands in these cases wherein it is recorded that no one was able to give the particulars of the name of the grantor or the purpose for which the inam was granted. But, however, the Inam Commissioner was prepared to confirm the inam as Kairathi. The word 'Kairathi' according to the Wilson's Glossary, can have any one of the following meanings: Alms, charity, lands given as charitable endowments the term is more especially applicable to grants or alms given by or to Mohamedans. Kairathi Zamin means the lands given in charity.

It is clear that the word 'Kairathi' used by the Inam Commissioner can also include lands given as charitable endowments to or by Mohammedans. The concerned file of the Wakf Board dealing with the enquiry under section 4 of the Wakf Act, was produced before me by the learned Advocate for the Wakf Board, at the time of the hearing of the writ petitions. That file shows that in 1955 both the village karnam as well as Syed Sahib Peeran the petitioner in Writ Petition No. 1048 of 1965, gave statements, which clearly show (1) that according to the tradition, the lands were granted by Tippu Sultan to a number of Mohammedan families,

but no documents were available with them, (2) that the lands were enjoyed without any alienations by the aforesaid Mohammedan families for several years, (3) that one of the conditions under which they held the lands was the feeding of Fakirs or Muslim Bairagis during certain Muslim festivals, (4) that the amount they spent on this feeding was about Rs. 400 as against the estimated income of about Rs. 5,000. These particulars elicited at the time of the enquiry will certainly be consistent with the properties being wakf properties. No doubt the persons in enjoyment were not able to produce the deed of dedication but they knew of a clear tradition that the grantor was Tippu Sultan that the properties never left the hands of the grantees and then descendants at any time, and that one of the objects which they had consistently followed was the feeding of a certain number of Muslim Bairagis during the time of certain Muslims festivals. That they were prepared to spend only a small proportion of the total income will not have any significance in the absence of the express terms of the grant, because by a process of negligence they might have spent less on feeding Bairagis with the passage of time then what they were expected to spend originally. So, no argument can be pressed, to infer the nature of the grant from the fact that at the present moment the enjoyers are spending only a small proportion out of the total income for the performance of a charity for which the properties might have been originally granted. Therefore, one cannot hold on *prima facie* grounds in the face of the data made available at the enquiry by the Wakf Board, that the properties on these cases, are so totally unconnected with an endorsement in the nature of a wakf, that the Wakf Board acted entirely without jurisdiction in the proceeding to treat them as wakf properties, and including them in the list of wakfs published in the Gazette under the provisions of the Act.

The further argument stressed by the learned Counsel for the petitioner is this. He refers to section 6 (1) of the Act, which gives a right to a party, where a dispute arises, whether a particular property is a wakf property or not to file a suit in a civil Court of competent jurisdiction. The section also states that decision of the civil Court in such a matter shall be final. The proviso to this section gives one year time limit for filing such a suit from the date of the publication of the list of wakfs under section 5 (2). Section 6 (4) says that the list of wakfs published under sub-section (2) of section 5 shall, unless it is modified in pursuance of a decision of the civil Court under sub-section (1) be final and conclusive. When the respondent relied upon these provisions of the Wakfs Act for negativing the right of the petitioners to obtain relief in the present writ proceedings, the learned Counsel for the petitioner urged that this being a case of there being no wakf at all, the remedy under Article 226 of the Constitution will be available to the petitioners. But as mentioned above on the data made available in the case it cannot be held conclusively that there is no *prima facie* or arguable case, about the wakf nature of the properties. On the other hand, there is considerable evidence including the statement of the petitioner in Writ Petition No. 1048 of 1965 as well as the village karnam which would support the view that the properties are wakf properties, and that out of the income from those properties only a small amount of Rs. 400 was spent on feeding of Fakirs at the time of certain Muslim festivals.

The decision cited by the petitioner *Zain Yar Jung* v. *Director of Endowments*[1], lays stress on the trust character of a wakf. But as mentioned already, it cannot be held on the data made available in this case that such a test must totally fail in this case. Learned Counsel for the respondent refers to a series of decision of this Court which have held that where an aggrieved party fails to resort to the provisions of section 6 of the Wakf Act for settling a dispute about the wakf character of the property, by filing a civil suit, he will be precluded from agitating the same question over again in writ proceedings. It is sufficient to refer to a recent decision of Venkatadri, J. In Writ Petition No. 1402 of 1963 and a decision of a Bench of this Court (to which I was a party) in Writ Appeal No. 144 of 1966.

1. (1963) 1 S.C.R. 469 : (1964) 1 S.C.J. 285 : (1964) 1 M.L.J. (S.C.) 84 : (1964) 1 An.W.R. (S.C.) 84 : A.I.R. 1963 S.C. 985.

Two other authorities referred to by the learned Counsel for the petitioners, *Pyx Granite Company Limited* v. *Ministry of Housing and Local Government*[1], and *Nundo Lal Bose* v. *The Corporation for the Town of Calcutta*[2], have no application to the circumstances of this case. Thus in *Pyx Granite Company Limited* v. *Ministry of Housing and Local Government*[1], under the Town and Country Planning Act of 1947 in England there was a provision enabling a person who wants to carry out certain operations on the land to apply to the local planning authority to determine the question. There was a provision also for attaching finality to the decision of a minister in appeal, against the decision of the local planning authority. It was held that these provisions would not whittle down the subjects' rights to have recourse to the ordinary Court. But in the present case in section 6, the statute specifically gives the remedy to the aggrieved party to contest the decision of the Wakf Board in the civil Court, and also provides that in the absence of such a decision the list of wakfs published under the Act will become final. This is a case, therefore, where the statute itself provides for the appropriate remedy for relief by resort to the ordinary Courts of the land, within a specific period of limitation prescribed for that purpose, and also provides that in the event of failure to resort to these steps, the decision of the Wakf Board shall be final. I am of the opinion therefore that the respondent's contention that the petitioners having failed to avail themselves of the remedies under the Act within the time allowed under the statute, cannot be permitted to agitate the same issue over again in writ proceedings has to be accepted.

There was a final argument of the learned Counsel for the petitioners, that since the petitioners do not satisfy the definition of Muthavalli under the Act they cannot be compelled to pay contribution. But this overlooks the fact that the definition of Muthavalli in section 3 (*f*) of the Act, will include a person who for the time being manages or administers wakf property as such. The petitioners are admittedly managing the wakf properties and performing the service of feeding poor fakirs. That they have not admitted the wakf nature of the properties will be a different question, which may lead to other steps to be taken under the Act. But that will not be a ground under which they can challenge the demand for contribution now made against them. The writ petitions are dismissed with costs. Advocate's fee Rs. 150 one set.

S.V.J. — *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. S. KAILASAM.

M. Chinnappan .. *Petitioner**

v.

The Management of Kaleeswarar Mills Ltd., Coimbatore and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), *sections* 2 (kkk), 2 (1) *and* 25 (fff)—*Right of management to close down an undertaking—Extent of—Closure, what is—Distinguished from lay-off and lock-out.*

The right of the management to close the business subject to the payment of compensation to the workers cannot be questioned. A person cannot be compelled to carry on the business. The management has got a right to close down an undertaking permanently or even temporarily for an indefinite period.

The term 'lay-off' has been defined in section 2 (*kkk*) of the Industrial Disputes Act as meaning the failure, refusal or inability of an employer on account of

1. L.R. (1960) A.C. 260. 2. (1885) I.L.R. 11 Cal. 275.

* W.P. No. 933 of 1966. 12th January, 1967.

shortage of coal, power or raw materials or the accumulation of stocks or the break-down of machinery, or for any other reason to give employment to a workman whose name is borne on the muster rolls of his industrial establishment and who has not been retrenched. The words 'for any other reason' have to be construed *ejusdem generis* with the reasons mentioned specifically in the section. That is, it should be construed to mean a reason which is allied or analogous to reasons already specified in the definition.

The term 'lock-out' is defined in section 2 (1) as meaning the closing of a place of employment or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him. The word 'closure' has not been defined under the Act. The distinction between 'closure' and 'lay-off' is clearly discernible. While lay-off is the failure, refusal, or inability of an employer due to reasons beyond his control to give employment to a workman whose name is borne on the muster rolls, closure is closing of the business permanently or temporarily for an indefinite period. Closure is different from lock-out. While in the case of closure the employer does not merely close down the place of business but the business itself indicating a final and irrevocable termination of the business itself, lock-out is the closure of the place of business and not the closure of the business itself for the purpose of compelling the employees to accept the proposals of the employer. The question, whether a particular case would be closure or lay-off would depend on the facts of the case.

The giving of a notice or the payment of compensation is not a condition precedent for closing of the business. Under section 25 (*fff*) of the Industrial Disputes Act the workmen are entitled to notice and compensation when the undertaking is closed as if the workmen had been retrenched. But the effectiveness of the closure does not depend upon the payment of compensation and service of notice or payment of wages in lieu of notice. Whether notice was given and compensation was paid or not would not make the closure anytheless effective.

In the instant case there was a closure and not a lay-off.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records in C.P. No. 8 of 1965 on the file of the Second Respondent herein and quash that portion of the order of the Labour Court, Coimbatore, dated 17th December, 1965, holding that the inability of the First Respondent to give work to the petitioner and the other workers from 13th August, 1958 to 31st October, 1959, would not amount to lay-off.

S. Ramaswami and *R. Ganesan*, for Petitioner.

V. Thyagarajan, *M. R. Narayanaswami* and *D. Meenakshisundaram*, for Respondents.

The Court made the following

ORDER.—This petition is filed for quashing the order of the Presiding Officer, Labour Court, Coimbatore dated 17th December, 1965, holding that the inability of the Management of Kaleeswarar Mills Limited, Coimbatore to give work to the petitioner and the other workers from 13th August, 1958 to 31st October, 1959 would not amount to lay-off.

The Kaleeswarar Mills, Coimbatore was closed on 8th December, 1958, and was reopened on 12th November, 1959. It is the contention of the petitioner that there was no closure but only a lay-off during the period in question. The Kaleeswarar Mills, Coimbatore was running at a loss. The balance-sheet, M-5, for the year ending with 31st December, 1957, showed a loss of Rs. 6,43,765, and the balance-sheet M-6, for the year ending 31st December, 1958, showed a loss of Rs. 15,21,768. The total loss for the years 1957 and 1958 amounted to Rs. 22,75,743. The auditor, who went into the affairs of the Mills submitted a report, M-32, on

19th May, 1958. In the reports the auditor pointed out that the proposal to work the factory adopting the lay-off was not advisable, as there would be an additional loss of Rs. 3,47,356. The report pointed out that any decision to keep on the muster all the workmen found therein would only increase the burden of compensation of gratuity payable to them if and when their services were terminated. It was suggested that the only course open to the authorities of the company was the immediate closure of the factory for saving their losses. The management considered the auditor's report on 30th July, 1958 and resolved taking into consideration the nine reasons set out in the resolution to have the factory closed for the present on and from 1st August, 1958. It also further resolved that the Board of Directors would review the situation from time to time and if thought fit would reopen the factory as and when the situation improved. It was further resolved to intimate the Council of Administrators appointed by the High Court in O.P. No. 113 of 1957 about the closure so as to enable them to take steps if thought fit to avert the impending closure or reopen the undertaking as early as practicable. In pursuance of this resolution a notice, M-4, was put on the notice board of the Kaleeswarar Mills on the same date. It declared that the Directors had resolved to close down the factory ' for the present ' and accordingly the factory would remain closed from 13th August, 1959 and that the Directors would review tha situation from time to time and if thought fit reopen the factory if and when the situation improved. The workers of the Mills protested against the closure of the Mills and by their notice, M-10, dated 13th August, 1958 contended that the closure of the Mills was illegal and demanded the immediate reopening of the Mills.

It was contended by the learned Advocate-General on behalf of the petitioners that on the facts there could have been no closure of the Mills but only a lay-off. It was submitted that there was no termination of the employer-servant relationship and that the petitioner and others continued to be in the muster rolls of the Mills after the date of the alleged closure. The resolution M-3, and the notice M-4, were strongly relied upon in support of the contention that there was only a lay-off and not closure. It was submitted that the resolution itself made it clear that the factory would remain closed *for the present* and that the Board of Directors would review the situation from time to time and if thought fit reopen the factory as and when the situation improved. The notice, M-4, also stated that it was resolved to close down the factory *for the present* and that the factory would remain closed and the Directors would review the situation from time to time and if thought fit reopen the factory if and when the situation improved. On a reading of M-3, and M-4, it was submitted that the intention of the Management was not to close the mills either permanently or temporarily but to stop the business for the time being, which would not amount to closure. On the facts this contention cannot be upheld, for it is clear from the auditor's report that the affairs of the company were gone into in detail by the auditor, and it was pointed out to the Management that a lay-off would not be the remedy as it would involve the company in further loss of about Rs. 3,50,000 and that the only course to adopt was the immediate closure of the Mills for the purpose of saving their losses. The company considered this report and accepted the recommendation of the auditor and directed the closure of the Mills. In directing the closure, the company mentioned that the factory was to be closed down for the time being and that the Management would review the situation from time to time and if thought fit reopen the factory if and when the situation improved. From the mere fact that the Directors mentioned that the factory would be closed for the time being it cannot be said that there was no closure permanently or temporarily for the time being. I am satisfied on a reading of the material documents that what the company intended was to close the business, at the same time hoping that matters would improve to facilitate the reopening of the Mills.

The right of the Management to close the business subject to the payment of the prescribed compensation to the workers cannot be questioned. A person cannot be compelled to carry on the business. A Bench of this Court in *Indian Metal and*

Metallurgical Corporation v. *Industrial Tribunal, Madras*[1], held that the Industrial Tribunal while having jurisdiction to adjudicate on the question whether a particular lock-out was justified or not could not decide the question whether an employer could close down this business temporarily for an indefinite period or permanently.

The term 'lay-off' has been defined in section 2 (*kkk*) of the Act as meaning the failure, refusal or inability of an employer on account of shortage of coal, power or raw materials or the accumulation of stocks or the breakdown of machinery, or for any other reason to give employment to a workman whose name is borne on muster rolls of his industrial establishment and who has not been retrenched. The words 'for any other reason' have to be construed *ejusdem generis* with the reasons mentioned specifically in the section. That is, it should be construed to mean a reason which is allied or analogous to reasons already specified in the definition (*Vide Kairbetta Estate, Kotagiri* v. *Rajamanickam and others*[2]. The term 'lock-out' is defined in section 2 (*e*) as meaning the closing of a place of employment or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him. The word 'closure' has not been defined under the Act. But the distinction between 'closure' and 'lay-off' is clearly discernible. While lay-off is the failure, refusal, or inability of an employer due to reasons beyond his control to give employment to a workman whose name is borne on the muster rolls, closure is closing of the business permanently or temporarily for an indefinite period by the management. Closure is different from lock-out. While in the case of closure the employer does not merely close down the place of business but the business itself indicating a final and irrevocable termination of the business itself, lock-out is the closure of the place of business and not the closure of the business itself for the purpose of compelling the employees to accept the proposals of the employer. The question, whether a particular case would be closure or lay-off would depend on the facts of the case. As pointed out already in this case the Management acting on the report of the auditor that the proposal to lay-off was not the proper one and that the Mills must be closed, directed the closure of the Mills. The mere fact that they hoped that the Mills might be reopened would not negative their intention to close the Mills on the date when they resolved to close down the Mills and notified the closure.

The learned Advocate-General relied on the fact that no notice as to termination of the service of the employees was given. The giving of a notice is not a condition precedent for closing of the business. In the case of retrenchment the validity of the retrenchment itself would depend on the workmen having been given a month's notice indicating the reasons for retrenchment, the paying of the retrenchment compensation as prescribed and the giving of the notice to the appropriate Government in the prescribed manner. The fulfilment of the above conditions are conditions precedent for effectiving a retrenchment. In the case of closure under Section 25 (*FFF*) the workmen are entitled to notice and compensation when the undertaking is closed as if the workmen had been retrenched. But the effectiveness of the closure does not depend upon the payment of compensation and service of notice or payment of wages in lieu of notice. The Supreme Court in *Hathi Singh Manufacturing Company* v. *Union of India*[3], has summed up the position thus:

> "By sections 25 (*F*) a prohibition against retrenchment until the condition prescribed by that section are fulfilled is imposed; by section 25 (*FFF*) (1), termination of employment on closure of the undertaking without payment of compensation and without either serving notice or paying wages in lieu of notice, is not prohibited. Payment of compensation and payment of wages for the period of notice are not therefore conditions precedent to closure."

That the mills intended to close down was notified on 13th August, 1958 by affixing M-4 to the notice board, is not disputed by the petitioners. Whether notice was

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1. (1952) 1 M.L.J. 481.
2. (1960) 2 L.L.J. 275: (1960) 3 S.C.R. 371 : A.I.R. 1960 S.C. 893.
3. (1960) 3 S.C.R. 528 : (1960) 2 L.L.J. 1 : A.I.R. 1960 S.C. 923 at 927.

given and compensation was paid or not would not make the closure any the less effective. The contention that because no notice of termination of the service and no compensation was paid, the closure is not valid has therefore to be rejected.

Reference was made to the judgment of the Supreme Court in C.A. No. 1005 of 1963 by the petitioner in support of the contention that before the undertaking could be closed down the Management should have taken irrevocable decision to close the mills permanently. It has been pointed out already that a Bench of this Court in *Indian Metal and Metallurgical Corporation* v. *The Industrial Tribunal, Madras*[1], has held that the Management has got a right to close down an undertaking permanently or temporarily for an indefinite period. In C.A. No. 1005 of 1963 though the mill was closed and the notice of termination of service was served on the workmen, after the new Management took over, the mill was reopened. It was contended that there was no closure. The Supreme Court negatived the contention and held that the Management intended to close down the mills, though they were subsequently reopened. The Supreme Court observed:

> "In these circumstances if it came to the conclusion that the best course for it was to close the mills until they could be reopened on a safe and profitable basis, it cannot be said that its action was not *bona fide*."

The closure of the mills until there could be a reopening on a safe and profitable basis has therefore been upheld by the Supreme Court. The closure can be as well for a temporary period. There can be no doubt that the Management intended to close the mills for the time being with the hope that matters would improve and they would be in a position to reopen the mills. Though the closure was intended for the time being, it is nonetheless closure which the Management is entitled to.

On a consideration of the entire facts I have no hesitation in accepting the finding of the Labour Court that there was a closure. The contentions raised on behalf of the petitioners are rejected and this petition is dismissed with costs.

Counsel's fees Rs. 250.

V.K. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. S. KAILASAM.

V. Perumal .. *Petitioner**

v.

State of Madras, represented by the Secretary to Government, Rural Development and Local Administration Department, Fort St. George, Madras, and another .. *Respondents.*

Madras District Municipalities Act (V of 1920), section 4—Madras Panchayats Act (XXXV of 1958), section 5—Respective scope—Constitution of municipality by combining a group of panchayats—Provision applicable is only section 4 of the Madras Act V of 1920—Reasons for constitution of the municipality need not be given.

As the provisions of section 4 (1) of the Madras District Municipalities Act are subject to the provisions of section 5 of the Madras Panchayats Act, 1958, if the constitution of the municipality falls within the scope of section 5 (1) or section 5 (2) of the Madras Panchayats Act, the procedure according to section 5 (1) or (2) should be followed and to that extent section 4 (1) of the Madras District Municipalities Act cannot have any operation. But section 5 (1) and (2) of the Madras Panchayats Act do not provide for constituting a municipality by combining a group of panchayats The provisions for constituting a group

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1. (1952) 1 M.L.J. 481.

* W.P. No. 2373 of 1966. 9th March, 1967.

of panchayats is made only under section 4 (1) of the Madras District Municipalities Act. Therefore, in the case of constituting a municipality by combining a group of panchayats, as in the present case, the provision applicable is only section 4 (1) of the District Municipalities Act and not section 5 of the Madras Panchayats Act.

The function of the Government in constituting a municipality being administrative in nature, it is not necessary for them to give their reasons for the order.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records pertaining to the formation of the Manapparai Municipality and quash the order in G.O.Ms. No. 2318, Rural Development and Local Administration Department, dated 30th September, 1966.

V. K. Thiruvenkatachari for *P. R. Gokulakrishnan* and *R. Balasubramaniam*, for Petitioner.

T. Selvaraj, for the Government Pleader, for Respondents.

The Court made the following

ORDER.—This petition is filed by the President of the Manapparai Town Panchayat for the issue of writ of *certiorari* calling for the records pertaining to the formation of the Manapparai Municipality and quashing G.O.Ms. No. 2318, Rural Development and Local Administration Department, dated 30th September, 1966.

The petitioner is the President of the Manapparai Town Panchayat. The strength of the panchayat is 16 members consisting of 15 elected members and one co-opted woman member. The petitioner was elected as the President of the Panchayat on 19th April, 1965 for a period of five years. The Government issued G.O.Ms. No. 1989, dated 12th August, 1966 proposing to constitute the area within the jurisdiction of the Manapparai, Kannudaiyanpatti, Kalingapatti and Usilampatti Panchayats into a Municipality. A notification was also issued under section 4 (1) (*a*) of the Madras District Municipalities Act (V of 1920) declaring the intention of the Government to constitute a Municipality in the name of Manapparai within the jurisdiction of Manapparai, Kannudaiyanpatti, Kalingapatti and Usilampatti Panchayats. It was also notified that any inhabitant of the area desiring to object to the proposal might submit his objections in writing to the Government within six weeks from the date of publication of the notification in the *Fort St. George Gazette*. Several representations were made regarding the proposal, and the Government by G.O. Ms. No. 2318, Local Administration, dated 30th September 1966 directed that the Municipality be constituted with effect from 1st October, 1966. A notification was appended to the effect that in exercise of the powers conferred by sub-section (3) of the section 4 of the Madras District Municipalities Act, 1920, the Governor of Madras declared that the local area now within the jurisdiction of the Manapparai, Kannudaiyanpatti, Kalingapatti and Usilampatti panchayats should constitute a municipality with effect from 1st October, 1966. The Notification also specified that from the date of the constitution of the Municipality, the Manapparai Municipality Council shall consist of twenty councillors.

The validity of this notification is challenged by the petitioner in this writ petitioner on the ground that the constitution of a Municipality by integrating several separate panchayats is beyond the powers conferred on the Government under the Panchayats Act and the District Municipalities Act. It was also contended that the members and the President of the Manapparai Town Panchayat having been elected for a period of five years had vested right and that the Government was not entitled to deprive them of their right by constituting the Municipality. It was alleged that the order was passed in fraud of the powers of the Government and *mala fide* by siding with a group of the Congress party.

Mr. V. K. Thiruvenkatachari, learned Counsel for the petitioner, did not press the contention that the order was illegal due to its depriving the members of their term of office. The plea that the order was vitiated as having been passed *mala fide* was also not pressed. The only question that was pressed before me was that the order passed was beyond the powers of the Government. Section 4 of the District Municipalities Act V of 1920 empowers the State Government to create municipalities. Section 4 (1) (*a*) provides that subject to the provisions of section 5 of the Madras Panchayats Act, 1958 the State Government may by notification declare their intention to constitute as a municipality any town, village, hamlet, bazaar, station or other local area or any group of the same in the immediate neighbourhood of one another. Sub-section (2) to section 4 enables an inhabitant of a local area to object to the proposal of constituting a municipality within six weeks from the publication of the notification. The words 'village or other local area' by virtue of section 197 of the Madras Panchayats Act XXXV of 1958 shall be deemed to be a reference to a panchayat village, panchayat town, panchayat development block or panchayat union as the circumstances may require. The power under section 4 (1) (*a*) of the District Municipalities Act, 1920, is to empower the Government to constitute a municipality by including any town, village, hamlet, bazaar, station or other local area or any group of the same in the immediate neighbourhood of one another. But section 4 of the District Municipalites Act is subject to the provisions of section 5 of the Madras Panchayats Act, 1958. Section 5 of the Madras Panchayats Act, 1958, enables the Government to constitute certain panchayat areas as municipalities. Section 5 (1) empowers the Government by notification to direct that any panchayat town with a population of not less than twenty thousand and with an estimated annual income of not less than one lakh of rupees be constituted as or included in a municipality for the purposes of the Madras District Municipalities Act, 1920 with effect on and from such date as may be specified in the notification, provided that before issuing a notification under this suu-section the panchayat concerned shall be given a reasonable opportunity for showing cause against such proposal. Section 5 (2) enables the Government on an application from the Panchayat concerned by notification to direct that any local area in which a town panchayat exercises jurisdiction with a population of less than twenty thousand but has an annual income exceeding one lakh of rupees be constituted as or included in a municipality for the purposes of the Madras District Municipalities Act, 1920. Under the proviso to this sub-section it is stated that the Government shall not so direct if the panchayat union council exercising jurisdiction over the area concerned objects to the issue of such direction and the Government are of opinion that the objection is well founded. Thus it will be seen under sub-section (1) in the case of a town panchayat with a population of not less than twenty thousand and an estimated annual income of not less than one lakh of rupees the Government may constitute a municipality after giving the panchayat a reasonable opportunity for showing cause against such proposal, while in the case of a panchayat, where the population is less than twenty thousand but the annual income exceeds one lakh of rupees, the Government may on an application from the panchayat constitute a municipality but shall not do so if the objection by the panchayat union council as to the constitution of a municipality is well founded. The population of Manapparai Panchayat is 17,902 and the income is over a lakh of rupees, and, therefore, if section 5 (2) is applicable the municipality can be constituted only on an application by the Manapparai Town Panchayat. So far as the other Kannudaiyanpatti, Kalingapatti and Usilampatti panchayats are concerned, the population of these panchayats is less than twenty thousand and the income less than one lakh of rupees. Therefore sub-sections (1) and (2) of section 5 of the Madras Panchayats Act will not be applicable to these panchayats. As the provisions of section 4 (1) of the Madras District Municipalities Act are subject to the provisions of section 5 of the Madras Panchayats Act, 1958, if the constitution of the municipality falls within the scope of section 5 (1) or section 5 (2) of the Madras Panchayats Act, the procedure according to section 5 (1) or (2) should be followed and to that extent section 4 (1) of the Madras District

Municipalities Act cannot have any operation. Mr. V. K. Thiruvenkatachari submitted that as special provisions have been enacted in the Madras Panchayat Act in the case of constitution of Municipalities, recourse should be had only to the Madras Panchayat Act. Learned Counsel referred to a passage in Halsbury's Laws of England, Volume 36, 3rd edition, page 405 where the law is stated thus:

> "When it is provided that two statutes are to be read together or construed as one, every part of each of them must be construed as if it had been contained in one statute, unless there is some manifest discrepancy, making it necessary to hold that the later statute has to some extent modified something in the earlier statute............... The earlier enactment may of course be directly or indirectly rendered inoperative *pro tanto* by an inconsistent provision of the later, but if it is reasonably possible to construe the enactments so as to give effect to both, that must be done."

The general principle is stated as follows at page 466:

> "The rule is, therefore, that one provision repeals another by implication if but only if, it is so inconsistent with or repugnant to that other that the two are incapable of standing together."

Learned Advocate-General appearing for the State did not dispute the proposition of law as expounded in the passages cited above, but submitted that the two statutes could be construed together as they are not inconsistent or repugnant to each other and are capable of standing together. He further contended that because of the specific provisions in the Madras District Municipalities Act which provides that section 4 is subject to the provisions of section 5 of the Madras Panchayats Act, 1958, if there is any inconsistency, the provisions of section 5 of the Madras Panchayats Act should prevail.

If the State Government wanted to constitute Manapparai Town Panchayat as a Municipality under section 5 (2) of the Madras Panchayats Act, it could have been only on an application by the Manapparai Panchayat after observing the procedure laid down in section 5 (2) of the Madras Panchayat Act. But in this case what was done by the Government was to constitute a municipality by amalgamating four panchayats. Sections 5 (1) and (2) of the Madras Panchayats Act do not provide for constituting a municipality by combining a group of panchayats. The provision for constituting a group of panchayat is made only under section 4 (1) of the Madras District Municipalities Act. Therefore, in the case of constituting a municipality by combining a group of panchayats the provision applicable is only section 4 (1) of the District Municipalities Act. Thus there is no conflict and the order of the Government cannot be questioned.

The function of the Government in constituting a municipality being administrative in nature, it is not necessary for them to give their reasons for the order. In Writ Petition Nos. 425 and 660 of 1964 Ramakrishnan, J., in dealing with the validity of a notification by the Government constituting the Alandur Town Panchayat into a Municipality under section 4 (3) of the District Municipalities Act by including three other panchayats held that the provisions of sections 5 (1) and 5 (2) were not applicable and that the notification was made validly under section 4 (1) (*a*) of the District Municipalities Act. I am in respectful agreement with the view taken by the learned Judge.

In the result the legality of the order of the Government constituting the Manapparai Town Panchayat as a Municipality by including three other panchayats cannot be assailed. The writ petition is dismissed. There will be no order as to costs.

V.K. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE N. KRISHNASWAMY REDDY.

N. Sathianathan N.S. Motor Service Ltd., and others .. *Petitioners**

v.

The Secretary, Regional Transport Authority, Salem and others .. *Respondents.*

Motor Vehicles Act, 1939 *(IV of* 1939), *as amended by the Central Act C of* 1956, *sections* 43 (1), 44 *and* 48 (3) (xiii) *and* (xvii)—*Power of the Regional Transport Authority to approve fares proposed by a transport operator—State Transport Authority and Regional Transport Authority to execute the directions of the Court under section* 43 (1)—*In executing the directions of Court the authorities not to arrogate to themselves the power of the Government to fix the fares.*

The power of the Government under section 43 (1) of the Motor Vehicles Act 1939 as amended by the Central Act C of 1956 is to issue directions to the State Transport Authority regarding the fixing of fares and freights for stage carriages, contract carriages and public carriers. This phraseology is very elastic and comprehensive and includes also the power to fix the maximum and minimum to be charged. It should follow, therefore, that the fares proposed by bus operators should conform to the Government's directive under section 43 (1). The scheme of sections 43 and 44 is that the State Transport Authority gives effect to the directions of the Government under section 43 (1) and in its turn for that purpose it gives directions to the Regional Transport Authority which will give effect to and be guided by them. The two authorities merely execute the directions of the Government and cannot in such execution purport to arrogate to themselves the power which the State Government only has under section 43 (1) to fix the fares. The implied power of approval under section 48 (3) (xii) and (xiii) merely enables the Regional Transport Authority to check up whether the rates proposed by the bus operator are in conformity with the directions of the Government under section 43 (1). Therefore, the Regional Transport Authority has no power in the exercise of its right of approval of the fares to fix by itself the rate of fares at its discretion.

W.P.No. 539 *of* 1966.—Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records on the file of the Secretary, Regional Transport Authority, Salem, in R. No. 13312/A3/64, dated 7th January, 1966 and quash the order and made therein.

W. P. No. 540 *of* 1966.—Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records on the file of the Secretary, Regional Transport Authority, Salem, in R. No. 13312/A3/64, dated 7th January, 1966 (prayer amended as per order of Court dated 26th July, 1966 in C.M.P. No. 7865 of 1966) (and the circular No. 8/66, being Memo. No. G2/9018/65, dated 5th February, 1966 of the Transport Commissioner, (Madras) and quash the said order and made therein.

W.P.Nos. 1868, 1870 *&* 1872 *of* 1966.—Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed with W.P. No. 1868 of 1966 on the file of the High Court, the High Court will be pleased to issue writs of *certiorari* calling for the records of the Secretary, Regional Transport Authority, Tiruchirapalli, in C. No. 60084/B2/65, dated 20th June, 1966 and quash the said order and made therein.

* W.P. Nos. 539, 540, 1868, 1869, 1870, 1871 1872 & 1873 of 1966.

7th April, 1967.

W.P.Nos. 1869, 1871 & 1873 *of* 1966.—Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed with W.P. No. 1868 of 1966 on the file of the High Court, the High Court will be pleased to issue writs of *mandamus* directing the Secretary, Regional Transport Authority, Tiruchirapalli to forbear from giving effect to the circular Rc. No. No. 13667/B2/64, dated 15th December, 1965 in so far as it prescribes the minimum fare of 30 paise per passenger for a distance of 12 kms.

V. K. Tiruvengadachari for *A. R. Ramanathan,* Advocate, for Petitioner in W.P. Nos. 539 and 540 of 1966.

G. Ramaswamy and *M. Kalyanasundaram,* Advocates, for Petitioner in W.P. Nos. 1868 to 1873 of 1966.

The Advocate-General for *M. N. Rangachari* and *V. C. Palaniswami,* Advocates, for 2nd Respondent in W.P. Nos. 539 and 540 of 1966.

The Assistant Government Pleader, for Respondents (State) in W.P. Nos. 539, 540, 1868, 1869, 1870, 1872 and 1873 of 1966.

The Order of the Court was made by

K. Veeraswami, J.—The question in these petitions is whether the Regional Transport Authority's power to approve fares for passengers in their stage carriages proposed by a transport operator within the limits directed by the State Government under section 43 (1) of the Motor Vehicles Act, 1939 includes authority to vary such fares and re-fix them as it thinks fit subject of course to the Government's directive as to the minimum and maximum fares to be charged. To decide the point, it is not necessary to narrate the facts in each of the petitions. But it will suffice to notice them in W.P. No. 539 of 1966. The petitioner is a transport operator who plies his stage carriages in Salem District and other inter-district routes in Salem and Tiruchi Districts and other inter-State routes. He had been charging since 1953 about 1/2 anna per mile per passenger though the Government had permitted then the maximum of 7½ pies per mile. By a notification the *Fort St. George Gazette,* dated 25th March, 1964, the State Government directed that fares should not exceed three paise per kilo metre in ordinary routes and five paise per kilo metre in ghat routes. The Secretary of the Regional Transport Authority, Salem, thereafter called upon the petitioner to file a fare table for approval. On the basis of the old fare, the petitioner fixed it roughly at the rate of 2½ paise per kilometre and submitted a fare table in respect of all his routes. The variation of the old fare was negligible. The Regional Transport Authority, however, refused to approve the fare table but by itself fixing the fare table at three paise per kilometre, directed the petitioner to adhere to it. The petitioner says that it has no right to do so and prays on that ground that the order of the Regional Transport Authority dated 7th January, 1966, be quashed.

Section 43 (1) before its amendment by Central Act C of 1956 conferred power on the State Government to fix, having regard to the desirability of preventing uneconomic competition among motor vehicles and after hearing the representatives of the interests affected and consulting the Provincial and Regional Transport Authorities concerned, the maximum or minimum fares or freights for stage carriages and public carriers to be applicable throughout the province or any area or route within the province. Accordingly, the then Provincial Government by an order dated 5th March, 1954 notified in the *Fort St. George Gazette* fixing the maximum fares for ordinary stage carriages at 7½ pies per mile in routes in the plain in the moffusal except in urban areas where there were town services, which was inclusive of the tax leviable under the Motor Vehicles (Taxation of Passengers and Goods) Act, 1952. This was subject to the provision that for distances of less than eight miles, a fare not exceeding five annas could be charged and that eight pies per mile might be charged at certain specified routes. A maximum of 13 pies per mile on ghat roads was fixed but for distances of less than four miles, a fare not exceeding four annas and three pies was charged. Other maxima for other routes including town

service were also fixed but they need not be referred to for present purposes. Under section 46 as it originally stood an application for permit to use a motor vehicle as a stage carriage should contain certain specified particulars and such other matters as may be prescribed. Rule 156 required an application for permit for a stage carriage to be in Form PSPA. Column 9 in the form related to the standard rate of fare which it was proposed to charge at so much per passenger per mile. Section 48 (3) (iii) empowered the Regional Transport Authority to attach to stage carriage permit the condition that copies of the fare table should be exhibited on the stage carriage and that the fare table should also be observed. Section 59 (3) stated that certain conditions mentioned there would be part of a permit and the one was that any prohibition or restriction imposed and any maximum or minimum fares or freights fixed by notification made under section 43 should be observed in connection with any vehicle or vehicles to which the permit related. Section 51 authorised the Regional Transport Authority to fix in the case of motor cabs fares that might be charged. Central Act C of 1956 amended these provisions. As amended section 43 (1) (i) conferred on the State Government power to issue, having regard to the desirability of preventing uneconomic competition among motor vehicles, directions from time to time to the State Transport Authority " regarding the fixing of fares and freights for stage carriages, contract carriages and public carriers." The difference between the old provision and the new is that prior to the amendment the power of the Government was to fix the maximum or minimum fares but after it, it was to issue directions to the State Transport Authority regarding the fixting of fares for stage carriages. The procedure for issuing such directions remains substantially the same. Section 44 (3) as amended requires a State Transport Authority to give effect to any directions issued under section 43 and gives it certain powers but subject to such directions including the power to co-ordinate and regulate the activities and policies of the Regional Transport Authorities, if any, of the State. Section 44(4) enables the State Transport Authority to issue directions to the Regional Transport Authority which the latter is required to give effect to and to be guided by such directions. Section 46, though amended in certain other particulars, contains a provision similar to the one before, namely the application for a permit should set out such other matters as may be prescribed. Rule 156 (1) like the old rule 156, prescribes the form of application for a permit for a stage carriage and column 9 in the present form is in identical terms as in the earlier form, namely, the standard rate of fare which is proposed to be charged at so many nP. per mile should be set out. Section 48 has been recast. Clause (*xii*) of sub-section (3) of the section which is one of the conditions that the Regional Transport Authority is entitled to attach to a stage carriage permit is " that fares shall be charged in accordance with the approved fare table." The next clause in the sub-section is another condition "that a copy of, or extract from, the fare table approved by the Regional Transport Authority and particulars of any special fares or rates of fares so approved for particular occasions shall be exhibited on every stage carriage and at specified stands and halts." Rule 134-A as modified by clause (*xvi*) gives power to the Regional Transport Authority " to approve fare table with or without modification in respect of a particular stage carriage or service of stage carriages." Section 59 (3) (*c*) remains as it was. After amendment of the Act by Central Act C of 1956, the State Government issued on 25th March, 1964, fresh directions to the State Transport Authority under section 43 (1) relating to fixation of fares for such carriages plying in Madras State. By these directions the State Government fixed 3 nP. per kilometre on roads in the plains in the mofussil except in urban areas where there are town services provided that for distances of less than 12 kilometres a fare not exceeding 30 nP. may be charged. A maximum of 5 nP. per kilometre has been fixed for stage carriages for ghat roads subject of course to the proviso that for distances of less than 6 kilometres, a fare not exceeding 25 nP. may be charged. The directions cover maximum fares to be allowed for city and town services, express stage carriages and stage carriages run on special occasions. Paragraph 3 of the directions said :

" The State Transport Authority is further directed having regard to the desirability of preventing uneconomic competition among motor vehicls to

take into consideration the conditions of the roads covered by the stage carriages and monopoly of operations and occupational ratio in fixing the above fares."

In accordance with these directions, the State Transport Authority in its turn issued directions to the Regional Transport Authority under section 44 (4) read with section 44-A. Its communication dated 28th March, 1964 referred to the directions of the Government under section 43 (1) and assumed that the actual rates at which passenger fares had been charged within the maximum specified by the Government were to be taken up for determination for the purpose of issuing directions to the Regional Transport Authorities. The communication proceeded to say that the Regional Transport Authority with effect from 1st April, 1964, should adopt the passenger fares as specified below it in fixing fares and approving of fares tables in respect of stage carriages. The rates specified for ordinary stage carriages are 2.5 nP. per kilometre on roads in the plains in the mofussil except in urban areas where there are town services. For distances of less than 12 kilometres, a fare not exceeding 28 nP. is allowed to be charged. 4.5 nP. per kilometre on ghat roads is fixed but for distances of less than 6 kilometres a fare not exceeding 25 nP. may be charged. One of the other direction in the communication reads:

"The Regional Transport Authorities are further directed to take immediate steps to fix the fares and approve the fare tables in accordance with the rates specified above for the respective classes of stage carriages in order to enforce the conditions (xii) and (xiii) specified under sub-section (3) of section 48 of the Motor Vehicles Act."

By amendment of the Transport Commissioner dated 3rd November, 1965, the rate of 2½ paise for ordinary stage carriages on roads in the plains was enhanced to 3 paise per kilometre. Apparently the petitioner was asked by the Regional Transport Authority, Salem to submit a fresh fare table and in the table so submitted by him, he proposed 2½ paise per kilometre as against 3 paise per kilometre fixed by the Government as the maximum fare under section 43 (1). The Regional Transport Authority by its order dated 7th January, 1966 informed the petitioner that he should adopt the fare table as approved by the Authority, that is 3 paise per kilometre.

Before us what is urged for the petitioners is that neither the Transport Authority nor the Regional Transport Authority has power to fix by itself the rate of fares to be followed by bus operators and that the power of the Regional Transport Authority is merely to approve the fares proposed by bus operators. It is said that power to approve included power to reject but not to modify the fares proposed by bus operators and fix the fares by itself at its discretion. The position that emerged with reference to the statutory provisions and the rules before and after the Central Act C of 1956 appears to be this. Both before and now the rates of fares are proposed by applicants for permits for stage carriages as may be seen from the form of application prescribed under section 46. But the fares so proposed must be subject to the minimum and maximum fares fixed by the Government under section 43 (1) as it stood before the 1956 Amendment. The power of Government under this section as amended in 1956 is to issue directions to the State Transport Authority regarding the fixing of fares and freights for stage carriages, contract carriages and public carriers. This phraseology is very elastic and comprehensive and includes also the power to fix the maximum and minimum to be charged. It should follow, therefore, that the fares proposed by bus operators should conform to the Government's directive under section 43 (1). The State Transport Authority's power in relation to the Governments' directive under section 43 (1), is to give effect to the directive and in its turn to give directions to the Regional Transport Authority who in discharge of its functions under the Act should give effect to and be guided by such directions. The powers of the State Transport Authority and the Regional Transport Authority do not, in our opinion include the power to fix the fares by themselves. Their power is only to give effect to the directions of the Government fixing the maximum and minimum rates. The power of the Regional Transport Authority is to give effect to the directions of the State Transport Authority and be guided by such directions. It may be noticed that the old section 51 conferred

power on the Regional Transport Authority to fix in the case of motor cabs the fares which might be charged. But no such power was given to the Regional Transport Authority or the State Transport Authority before the Central Act C of 1956 to fix fares for other kinds of motor vehicles. The position appears to be no different even after the amending Act of 1956.

For the State it is said that the power for the Regional Transport Authority to fix rates is sought to be derived from section 48 (3) (*xii*) and (*xiii*). It is contended that reference in the two clauses to fare table approved by the Regional Transport Authority implies that the Authority has the power to approve fares and this means that the authority can reject the fares proposed by the bus operator and fix the rate of fare by itself. We are unable to accept the last part of this contention. In our opinion the word 'approved' in section 48 (3) (*xii*) and (*xiii*) in the context does not include the power for the Regional Transport Authority to fix rates by itself. As we said that power has been given to the Regional Transport Authority in respect of motor cabs and the power to fix fares for other kinds of motor vehicles was with the Government under section 43 (1). After the amendment, that power of the Regional Transport Authority has been included in the power of the Government under section 43 (1) as amended in 1956. The scheme of sections 43 and 44 is that the State Transport Authority gives effect to the directions of the Government under section 43 (1) and in its turn for that purpose it gives directions to the Regional Transport Authority which will give effect to and be guided by them. The two authorities merely execute the directions of the Government and cannot in such execution purport to arrogate to themselves the power which the State Government only has under section 43 (1) to fix the fares. The implied power of approval under section 48 (3) (*xii*) and (*xiii*) merely enables the Regional Transport Authority to check up whether the rates proposed by the bus operator are in conformity with the directions of the Government under section 43 (1).

Radha Gobinda v. *R. T. A., Midnapore*[1], held on interpretation of the Motor Vehicles Act as stood prior to the Central Act C of 1956 that the Regional Transport Authority had no power to fix the rates under the Act. The Calcutta High Court said :

> "......The Regional Transport Authority has no power to fix the rates under the Act until either of the two contingencies happen, namely, some provision is made by amending the Act, granting to it the power to fix the rates of fares in respect of stage carriages or such a power is prescribed by rules made by the State Government empowering the Regional Transport Authority to impose it as a condition of the permits issued to stage carriages owners."

There is no indication in the Central Act C of 1956 or rules framed under the Motor Vehicles Act as modified after 1956 that power has been given to the Regional Transport Authority or the Transport Authority to fix the rates of fares themselves. It is true that in *Amarnath* v. *State Transport Authority*[2], K.K. Desai, J., appears to be of a different view. The learned Judge there observes :

> "These provisions (sections 48 and 51) necessarily show that it is obligatory on Regional Transport Authority in respect of an application for permit for stage carriage and/or contract carriage to fix the fares to be charged. In the matter of mentioning the fares to be charged .if directions are given under section 43 by the State Government or by the State Transport Authority under section 44 Regional Transport Authority would necessarily have to mention the fares so directed in each permit. In the absence of such directions it is obvious that unless Regional Transport Authority fixes fares in the conditions of permit it would fail to discharge its duty in the matter of fixing fares."

The learned Judge was there concerned with a contract carriage and in respect of such a vehicle section 51 (2) gives powers to the Regional Transport Authority to

1. A.I.R. 1955 Cal. 59.
2. A.I.R. 1962 Bom. 124.

attach a condition to the permit that "in the case of vehicles other than motor cabs, specified rates of hiring not exceeding specified maxima shall be charged". A similar power is given to the Regional Transport Authority in the case of motor cabs to attach a condition in the permit specified fares or rates of fares shall be charged. But in section 48 relating to stage carriage permit, there is no such power granted to the Regional Transport Authority. Assuming that section 51 (2) bears the interpretation which Desai, J., places on it, the language in section 48 (3) (*xii*) and (*xiii*) is different and we are not prepared to hold that section 48 (3) (*xii*) and (*xiii*) confers on the Regional Transport Authority the power to fix fares by itself. As held by the Supreme Court in *Malik Ram* v. *State of Rajasthan*[1], an authority to which power has been given to approve or modify some proposal has certainly the powers to say that it will not approve the proposal at all. We are willing to take it that a power to approve will certainly include a power to reject. But whether the power will include also a power to modify will depend on the terms of conferment of the power and the context.

Having regard to the scheme of the Act as modified in 1956, we are of the view that it is the operator who is to propose the fares and the Regional Transport Authority in exercise of its power of approval may approve the proposed fares or decline to do so but on the ground that the fares proposed are not in conformity with the directions given under section 43 (1). The Regional Transport Authority has no power in exercise of its right of approval of the fares to fix by itself the rate of fares at its discretion. It may be seen that in fixing the minimum or maximum fare, the State Government under section 43 (1) is to have regard to the desirability of preventing uneconomic competition among motor vehicles. Before giving directions, it has to hear representatives of the interests affected and also consult the State and Regional Transport Authorities. When can a competition be said to be uneconomic. We suppose that such a situation may arise in cases of under cutting to drive out other operators or there are too many permits on a route so that every one will have to run at the lowest load or at a loss. Minimum rates are prescribed to control under cutting and maximum rates to check the greed of operators. When there are too many permits on a route, the number of vehicles on the route are regulated as provided in section 47. Leslie A Schunmer in his book on "Elements of Transport" states at page 180 :

> "The desirable limitation of connection is effected by (*a*) controlling entry into the transport system and the expansion of existing facilities; and/or (*b*) prescribing the minimum rates to be charged for services.
>
> The prescription of minimum rates to be charged by professional carriers may be an alternative or complementary method of removing the destructive element, in competition, namely, general cutting of rates to levels below cost. It aims at establishing a scale of charges at a level high enough to permit efficient carriers to operate profitable. The minimum rates are usually fixed after a close study of the costs in providing service and, when fixed, become enforceable by law on both the carrier and the user of the service."

We may expect that when the State Government issued directions under section 43 (1) fixing the maximum rates to be charged, it had like considerations in mind to prevent uneconomic competition among the motor vehicles. But when the State Government gave directions that the rates to be charged should not exceed the maximum fares specified, it did not follow from it that there would be justification for fixing the rate at the maximum without regard to other factors.

It was argued for the respondents that the State Transport Authority had power under section 44 (3) to co-ordinate and regulate the activities and policies of the Regional Transport Authorities of the State and that this implied that it could direct the Regional Transport Authorities to fix the fare at the maximum allowed by the direction under section 43 (1). We cannot accept the contention. The power to

1. (1963) 1 S.C.J. 461 : (1962) 1 S.C.R. 978 : A.I.R. 1961 S.C. 1575.

fix rates is different and distinct from power to co-ordinate and regulate the activities and policies of the Regional Transport Authorities. The only reason for the Regional Transport Authority to fix the fares at the maximum rates appears to be that other transport operators in Salem District charged that rate. It seems to us that this will be entirely an irrelevant consideration.

The petitions are allowed with costs in W.P. No. 539 of 1966. Counsel's fees Rs. 100. There will be no costs in the other petitions.

V.M.K. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE VEERASWAMI AND MR. JUSTICE NATESAN.

Zenith Lamps and Electricals Ltd. .. *Petitioner**

v.

The Registrar, High Court, Madras and others .. *Respondents.*

Madras Court-fees and Suits Valuation Act (*XIV of* 1955), *Schedule I, Article* 1—*Madras High Court-Fees Rules* (1956), *Order* 2, *rule* 1—*Constitutional validity—Provisions if in excess of the power conferred on the State Legislature by Entry* 3 *of List II of the 7th Schedule to the Constitution of India*—' *Tax* ' *and* ' *fee* '—*Distinction between—Nature and character of court-fees.*

Constitution of India (1950), *Schedule* 7, *List II, Entry* 3—*Scope—Word* ' *fees* ' *in the entry—Meaning and content of.*

Article 1 of Schedule I of the Madras Court-fees and Suits Valuation Act of 1955 and rule 1 of Order 2 of the High Court Fees Rules, 1956, in so far as they set out for the levy of Court-fees in the High Court in the exercise of its original jurisdiction, are invalid and *ultra vires* as an impost in excess of the powers conferred on the State Legislature by Entry 3 of List II of the 7th Schedule to the Constitution of India. These provisions which provide for an uniform *ad valorem* fee without limit at 7½ per cent. giving up the slab system and tapering scale on the slab of the pre-existing law, are wholly unreasonable. As the value of the claim by a suitor goes up, the levy becomes more and more unrelated to the object of the levy. While it cannot be denied that Court-fee may have some relation to the magnitude of the claim, it should not be overlooked that it is only a fee and is intended only for the special services which the suitor seeks through the Courts. As the value of the claim goes up the levy becomes excessive, grossly disproportionate and unreasonable to the services rendered to the particular suitor. It then ceases to be a fee and becomes a tax for him. The said provisions will therefore have to be struck down as unconstitutional.

Entry 3 of List II of the 7th Schedule to the Constitution authorises laws with respect to " fees taken in all Courts except the Supreme Court." The expression is " fees " and not " taxes " and the Constitution under its several provisions makes a distinction between fees and taxes.

While the duty to pay taxes generally follows from the fact of membership in the State, the duty to pay fees arises only as a result of making a special demand. Generally speaking, it may be said that, where fees are charged for any service and are not intended to exceed the cost of the service, the fees charged for practical purposes, do not constitute taxation. But when the fees charged are raised to such an extent as to far exceed the value of the services and to contribute substantially to the general revenues of the State, in effect it becomes a tax. Tax is a

* W.P. No. 743 of 1964, Application No. 2486 of 1964 in C.S. No. 7 of 1959, Application No. 2445 of 1964 in C. S. No. 46 of 1961, W. P. No. 3891 of 1965, Diary No. 4359 of 1965 and Diary No. 6672 of 1966. 31st March, 1967.

genus of which fee is a species. When the power granted is just taxation, it would cover every conceivable exaction which it is possible for Government to make. But when the constitution under a particular head does not grant a general power to tax but limits and circumscribes the grant to the particular species, fees, the power given cannot in its exercise be equated to the general power of taxation with all its consequences. If what had been authorised is a fee then there has to be correlation between the income and the expenditure. The Court in such a case should scrutinise the reasonableness of the levy and strike down the levy if it had exceeded the bounds of a fee.

The essential element of a fee is that it is a levy in consideration of services performed by the State for the benefit of the individual, who is called upon to make the payment and it cannot be an exaction that cannot be reasonably correlated to the services. Of course there is some element of taxation even in a fee. All the same the essential distinction is there and the question will always be to look for the pith and substance whether the taxing element predominates. If the element of revenue for the general purposes of the State predominates then the taxing element takes hold of the levy and it ceases to have any relation to the cost of administration to which it relates. It then becomes a tax.

Case law extensively quoted.

It is difficult to accept the contention that the word " fees " used in Entry 3 of List II of the 7th Schedule to the Constitution should not be given its limited meaning as impost for services sought or rendered. It would be going against the ordinarily accepted cannons of construction to hold that the expression fees in Entry 3 of list II does not carry its normally accepted connotation.

The contention that the fees levied in Courts do not belong to the class of fees which have to be commensurate with the services rendered, that the fees levied in Courts are and have always been treated on a different footing from all other fees, that the element of *quid pro quo* should not be looked for in fees levied in Courts and that the fees collected had always been treated in the past as part of the public revenues, is untenable.

The mere fact that the fees taken in Courts are made a separate head of legislation, *viz.*, Entry 3 of List II of the 7th Schedule to the Constitution, cannot alter the innate character of the levy as a fee. Nor has the argument any force that fees taken in Courts cannot be considered to be fees in the technical sense as under the Constitution they have to form part of the Consolidated fund. It is not an essential element of a levy to be a fee that it must be separately funded. If correlation could be otherwise established the levy could be shown to be a fee and the mere fact that it goes into the consolidated fund would not take away its character as a fee if otherwise it is a fee.

The argument that the history, legislative practice and judicial dicta (fully analysed in the judgment) with reference to the levy of fees in Courts is to treat fees taken in Courts as a category by itself and as a source of the general revenues of the State, is unsound. Neither the legislative history of the levy nor the judicial pronouncements as to the character of the levy compel us to hold that fees levied in Courts are taxes and that their reasonableness is not open to scrutiny.

Khacheru Singh v. *S. D. O. Khurja*, A.I.R. 1960 All. 462 (F.B.) and *C. P. Syndicate (P.) Ltd.* v. *Income-tax Commissioner*, A.I.R. 1962 Bom. 106, dissented from.

(History of the levy of Court-fees in India traced.)

The levy under the Madras Court-fees and Suits Valuation Act, 1955 or its incidence on suits with large claims cannot but be manifestly unreasonable. As it is, as the value of the claim goes up, the levy becomes more and more unrelated to the object of the levy. A few suitors would be made to bear a heavy share of the expenditure unrelated to the services required by them with the result that when the claims are high only one of the two essential elements of a

levy to be regarded as a fee is left. While the occasion for the levy is the demand of special service by the suitor, that is one element of fee is present, there is no reasonable correlation between the levy and the service, that is the second element of fee is lacking. The levy in the case of large claims becomes excessive, grossly disproportionate and unreasonable *qua* the particular suitor. Any levy on a suitor in the civil Court whereby revenue are realised generally and unrelated to his cause will to that extent be an impost in the nature of a tax.

[Question whether a civil suitor is bound to bear the cost of administration of criminal justice and the cost of Law Officers of the State discussed.]

W.P. No. 1743 *of* 1964.—Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* declaring rule 1 of the High Court-Fees Rules, 1956 and the provisions of the Madras Court-Fees and Suits Valuation Act XIV of 1955 to be invalid and *ultra vires* in so far as they relate to fees in suits and appeals on the Original Side and appeals therefrom and directing the Registrar to levy fees in suits and appeals in accordance with Court-Fees Act, 1870 as amended and in force immediately prior to the enactment of Madras Act XIV of 1955.

Application No. 2486 *of* 1964 *in C. S. No.* 7 *of* 1959.—Application for refund of so much of the court-fees paid by the applicant for filing the above suit, which is in excess of the court-fees payable as per the Court-Fees Act of 1870 (Central Act VII of 1870) as amended by the Madras State Court-Fees Act of 1922 (Madras Act V of 1922) and by the Court-Fees (Madras Amendment) Act of 1945 (Madras Act XVII of 1945), etc.

Diary No. 4359 *of* 1965.—Plaint under Order 7, rule 1, Civil Procedure Code and Order 4, rule 1 of O. S. Rules (*i*) for the recovery of Rs. 2,00,000 as damages for the tortious conduct, for trespass and illegal search and seizure of properties, (*ii*) for the return of cash of Rs. 1,552, (*iii*) for the return of the suit case with its contents belonging to Sri R. S. Jhaver to the plaintiff, if the same has not been returned already which is valued at Rs. 5,000 and for the costs of the suit. Though the suit is valued at Rs. 2,06,552, a Court-fee of Rs. 2,722-43 is paid. The plaintiff claims that the Court-fees Act, 1955 is void and *ultra vires* as the increases therein converts the fee into tax and in particular is void as to suits above Rs. 50,000 in charging *ad valorem* without limit.

Diary No. 6672 *of* 1966.—Plaint under Order 4, rule 1 of the O.S. Rules and Order 7, rule 1 of Civil Procedure Code, to direct the defendant to convey and execute the necessary sale deed in favour of the plaintiff of the property bearing No. 3, Eldams Road, Teynampet, Madras, and measuring 16 grounds and 2,177 sq. ft. and more particularly described in the Schedule attached to the plaint or in the alternative to direct the defendant to return the sum of Rs. 40,000 with interest at 12 per cent. per annum from 16th May, 1963, and to direct the defendant to pay a sum of Rs. 1,20,000 as damages. Though the suit is valued at Rs. 1,60,000 a Court-fee of Rs. 2,452-50 is paid under Schedule I of the Court-Fees Act, 1870. The Madras Act XIV of 1955 providing uniform rate of 7½ per cent. is *ultra vires* under the Constitution.

V. K. Thiruvenkatachari for *A. R. Ramanathan*, for Petitioner in W.P. No. 1743 of 1964.

G. Ramaswami, for Petitioner in Application No. 2445 of 1964.

S.V. Subramanyam for *Sethuraman* and *Padmanabhan*, for Petitioner in Application No. 2486 of 1964.

L. V. Krishnaswami Iyer, for Respondents Nos. 1 and 2 in Application No. 2486 of 1964.

V. Thyagarajan, for Respondents 3 to 8 in Application No. 2486 of 1964.

V. Venkataraman, for Respondents in Application No. 2445 of 1964.

The Additional Government Pleader, for Respondents Nos. 1 to 3 in W.P. No. 1743 of 1964.

The Advocate-General and the Government Pleader, for State.

(W.P. No. 1743 of 1964 and Application No. 2486 of 1964 in C.S. No. 7 of 1959 and Application No. 2445 of 1964 in C.S. No. 46 of 1961 came up before Srinivasan, J.).

The Court made the following

ORDER*—The Original Side Rules of the High Court were framed by virtue of the powers conferred by the Letters Patent, the Government of India Act, and other enactments. The High Court-Fees Rules which obtained in 1933 made provision by Order 2 thereof for the charging of fees set out in Appendix II. Therein the fee leviable in respect of plaints was specified in Serial No. 1 to be Rs. 225 where the value of the subject-matter of the suit does not exceed Rs. 2,500 and Rs. 5 for every thousand or part thereof in excess of Rs. 2,500. Serial No. 35 provided for a similar fee to be paid on the memorandum of appeal from a final judgment. This scale of fees was revised in 1949. This continued in force till the Madras Court-fees Act, XIV of 1955, was passed. The High Court, then revised its rules on the Original Side and by rule 1 of Order 2 of the High Court-fees Rules, 1956, the levy of fees was provided for in this manner:

> "The fees in all suits and proceedings instituted on or after the 19th day of May, 1955, and all proceedings by way of appeal or otherwise arising therefrom shall be levied by the Registrar, the Sheriff and the Reserve Bank of India, as the case may be, according to the provisions of the Madras Court-fees and Suits Valuation Act (XIV of 1955) and the rules framed thereunder..............."

The application of the Court-Fees Act of 1955 admittedly resulted in the position that when suits or appeals dealt with subject-matter of the value of Rs. 1,00,000 and above, the fees so levied became excessive as compared with the earlier scale of fees. In Application No. 2445 of 1964 in C.S. No. 46 of 1961, the petitioner had filed a suit for specific performance claiming in the alternative damages to the value of Rs. 3,00,000. The court-fee leviable under Act XIV of 1955 came to Rs. 26,075.25nP. The petitioner claimed that the slab system that was adopted under the old Court-Fees Act called for the payment of a very much smaller figure as Court-fee. He claimed that the levy of this excessive Court-fee is out of all proportion to the expenses involved in the administration of justice and that such a levy is unconstitutional as amounting to an unreasonable restriction on the fundamental rights. He attacked the Court-Fees Act as *ultra vires* and prayed that he should be granted a refund of that portion of the fee which was over and above that which can be charged under the Court-Fees Act of 1922. In Application No. 2486 of 1964 in C.S. No. 7 of 1959, the plaintiff in the suit is the applicant. For similar reasons as those advanced in the earlier application, this applicant contended that the Court-fee, which he was called upon to pay on the suit claim, which came to Rs. 19,500 was far in excess of the fee that should have been leviable under the earlier Court-Fees Act of 1922. The levy was attacked as an exorbitant charge for the administration of justice and as highly arbitrary and oppressive.

In W.P. No. 1743 of 1964, the petitioner sought to file a suit in which the relief was valued at over Rs. 2,00,000. The filing of the suit would require a heavy payment as Court-fee under the 1955 Act read with rule 1 of Order 2 of the High Court-Fees Rules, 1956. Challenging the levy as invalid and *ultra vires*, the petitioner seeks in this writ petition the issue of a writ of *mandamus*, direction or order, to declare the rule referred to and the provisions of the Madras Court-Fees and Suits Valuation Act (XIV of 1955) to be invalid and *ultra vires* in so far they relate to fees in suits and appeals on the Original Side and to direct the Registrar to levy fees in accordance with the Court-Fees Act of 1870, as amended and in force immediately prior to the passing of Madras Act XIV of 1955.

* 23rd April, 1965.

The counter-affidavit filed by the State of Madras in this writ petition denies the charge of invalidity. It is claimed herein that the Act of 1955 amended the entire law and in fact reduced the quantum of court-fee payable in respect of claims of smaller value. Certain figures have been furnished in the counter-affidavit with regard to the actual realisations by way of court-fee for the year 1954-55 and the expenses of administration of justice. Broadly stated, the figures are: the total of the receipts are said to amount to Rs. 122 lakhs, while the cost of administration of justice inclusive of the cost of administration of criminal justice is in excess of that figure, being nearly Rs. 125 lakhs. It is accordingly claimed that the scale of fee has been devised only to meet the actual charge of administration of justice and does not result in placing any heavy or unbearable burden upon the suitor. In the other two applications, the counter-affidavit filed on behalf of the State of Madras merely states that no refund as claimed can be ordered in terms of the provisions of the Act, and that in so far as the other contentions regarding the validity are concerned, the averment in the counter-affidavit filed in the writ petition adequately deal with that aspect of the matter.

Briefly stated, the Court-Fees Act, 1955, follows a pattern of levy of fees which marks a departure from the pattern that was followed either in the Court-Fees Act of 1870 or in similar later enactments of different States; and broadly stating the position, the pattern was to taper off the levy of the fee in the higher slabs of suit claims. Again, a certain maximum was also fixed in the earlier enactments. Taking the Court-fees Act of 1870, in respect of suit claims upto Rs. 1,000, the rate was 7½ per cent. of the value of the subject-matter; between Rs. 1,001 and Rs. 5,000 of the value of the subject-matter, the rate was 5 per cent.; between Rs. 5,001 and Rs. 10,000, Rs. 10,001 and Rs. 20,000, Rs. 20,001 and Rs. 30,000 and Rs. 30,001 to Rs. 50,000, the rates were respectively 4, 3, 2 and 1 per cent. In all claims above Rs. 50,000, the rate was half per cent. of the amount in excess of Rs. 50,000. The 1870 Act also prescribed a maximum of Rs. 3,000; that is to say, if on the computation of the Court-fee according to the scale, the Court-fee worked out to a figure above Rs. 3,000 on the basis of the value of the subject-matter nevertheless, the suitor had to pay only this maximum. The Madras Court-fees Act of 1922 also followed the same pattern of tapering off. Though the rates on the various slabs were higher than those in 1870 Act, the principle of having a lower rate on the successive higher slabs was adopted. Virtually, the same scheme finds place in all the Court-fees Act of the various States.

When the Madras Legislature enacted Act XIV of 1955, however, this tapering scale was abandoned and a flat rate of 7½ per cent. of the value of the subject-matter was fixed. To take for instance the figures relevant to the levy in respect of a claim of Rs. 10,00,000 under the 1870 Act, the maximum Court-fee was only Rs. 3,000; Andhra Pradesh Rs. 12,427-8-0; Assam Rs. 9,262-8-0, Bihar Rs. 10,000; Bombay Rs. 8,156-4-0, Kerala Rs. 3,000 being maximum and Madhya Pradesh Rs. 4,000 being the maximum. But in Madras, the amount of Court-fee leviable on such a claim is 7½ per cent., being Rs. 75,000. These figures are extracted from the XIV Report (Vol. I) of the Law Commission of India.

Mr. V. K. Thiruvenkatachari, learned Counsel for the petitioner and the applicants in these cases, argues that the tapering scale was intended to avoid undue burden on a litigant and that it was also based upon the principle that the services rendered by the State in making provision for the administration of justice had to be equally distributed as a fee, for the precise quantum of service rendered in any particular case could not be ascertained. It would accordingly be unrealistic to claim that such service in a suit increases in direct proportion to the value of the subject-matter of the suit. As it cannot be stated that solely by reason of the value of the subject-matter the service increases in its scope, the pattern of the earlier legislation on this matter rightly provided for a tapering scale, and that principle was regarded as in fact consistent with the levy of a fee as distinct from the levy of a tax. It is further pointed by the learned Counsel that while enacting the Court-fees Act of 1870, the Legislature in fact reduced the Court-fee that was being pre-

viously levied. In the statement of objects and reasons relevant to the 1870 enactment, it was stated that the rate of stamp fees leviable in the Courts, as fixed in the earlier Act of 1867 were to a great extent tentative and that the experience gained of their working ' seems to be conclusive as to their repressive effect on the general litigation of the country.' It was also stated then that it was thought expedient to make " a general reduction in the rates now chargeable on the institution of civil suits and to revert to the principle of maximum fee which obtained under the former law." The Legislature at that time thought that levy of high Court-fees was in fact a deterrent to litigation and to the obtaining of relief by suitors and the adjudication of their lawful claims.

While it is not denied that the fees levied under the Court-fees Act is intended to provide for the cost of administration and note has to be taken of the fact that such costs of administration have been increasing in the recent times, it is nevertheless contended that the mode of computation of the fee adopted by the Madras Act of 1955 altogether disentitles it to be called a fee and makes it a tax as it were on the litigation or in the adjudication or enforcement of lawful claims of the citizen. In the statement of objects and reasons that preceded the Act of 1955, it was observed that conditions have materially changed since the enactment of the 1870 Act and litigation had grown enormously in variety and complexity and the Legislature purported to attempt a " rationalisation " of the laws relating to Court-fees as an urgent measure of judicial reform. The statement of objects and reasons further stated that an *ad valorem* fee of $7\frac{1}{2}$ per cent. was being payable as a uniform rate, as the disparity in levy of fee of differing slabs of suit claims could not be justified. While in the case of suits relating to small amounts the obligation to pay a fairly high rate of fee was a hardship, there did not appear to be any justification to levy a lower rate of fee in respect of litigation above Rs. 5,000, and for these reasons, the rate of fee was made uniform at $7\frac{1}{2}$ per cent. No doubt, if mere uniformity in the scale of fee is to be the guiding principle no attack can be levelled against the Act. But, according to the learned Counsel, that is not a principle which would be applied without having regard to the underlying concept of what the State should in law and in justice recover from the suitor, for whose benefit it provides a machinery for the administration of justice. It is pointed out by the learned Counsel that it is not always that a successful suitor is able to recover the Court-fee from the defeated defendant. Even assuming that he can do so, does it afford a proper reply to the charge that the fee is excessive and unreasonable? Even the contention that the suitor can recover from the defendant only shifts the burden from one suitor to another and makes the cost of defence prohibitive. It does not answer the attack on the question of principle involved.

At the outset it may be pointed out that the legislative lists do make a distinction between a tax and a fee. While List I of the Seventh Schedule to the Constitution by Entry 95 confers legislative power upon the Parliament to enact a law regarding jurisdiction and powers of all Courts except the Supreme Court with respect to any of the matters in that list, by Entry 96, it does not enable the Parliament to legislate for fees taken in any Court, though it can legislate for fees in respect of any of the matters in the List. Entry 77 of List I covers the constitution, organisation, jurisdiction and powers of the Supreme Court, including contempt of such Court, and the fees taken therein. Entry 3 in List II, the State List, provides for legislation by the State Legislature of fees taken in all Courts except the Supreme Court. Entry 66 of List II covers fees in respect of any of the matters in this List, not including fees taken in any Court. Similarly, the Concurrent List also provides for legislation regarding fees in respect of any of the matters in this list, but not including fees taken in any Court. Firstly, therefore, a distinction is made in the legislative lists between fees taken in Court and fees charged in respect of any of the matters in the relevant list. The result would appear to be that in so far as fees taken in Court is concerned, power to legislate is derived from Entry 3 of the State List, and both the Parliament in legislating in respect of any topic in List I or List III and the State Legislature in legislating on any matter contained in the Concurrent List III

are prohibited from legislating in respect of fees to be taken in any Court. That power is undoubtedly given exclusively to the State Legislature. Nextly, reference has been made by the learned Counsel to the fact that taxes in respect of which the several Legislatures can legislate, are enumerated in the Lists themselves. It is obvious that the power of the Legislature to levy a tax cannot travel outside the scope of the specific entries contained in the Lists and the Lists themselves do make a distinction, which is clear and unambiguous, between a fee and a tax. It is the contention of the learned Counsel that looked at in the light of the history of the previous legislation, a pattern set over a period of nearly a century a principle can be gathered, *viz.*, that in providing for a lower rate of fee on the higher slabs of suit claims, an attempt has been made to lay an even burden as it were on all classes o suitors to bear the cost of the machinery of administration of justice. For the first time, however, the Madras Legislature has deviated from this principle and the result is clearly that one class of suitors, those with claims for larger amounts, are called upon to pay an unequal share of that burden.

When a fee ceases to be a fee and assumes the proportion of a tax has been subject-matter of several decisions, to a few of which reference may usefully be made. In the *Commissioner, Hindu Religious and Charitable Endowments* v. *Sri Lakshmindra Thirtha Swamiar*[1], their Lordships of the Supreme Court had to consider the distinction between a tax and a fee. They start with the definition given to the expression 'tax' by the High Court of Australia, which is in these terms. (at page 295) :

> " A tax is a compulsory exaction of money by a public authority for public purposes enforceable by law and is not a payment for services rendered."

They observe that the essence of taxation is compulsion, that it is imposed under statutory power without the taxpayers' consent and the payment is enforced by law. The next characteristic of a tax was said to be that it is an imposition made for a public purpose without reference to any special benefit to be conferred on the payer of the tax, that is to say, the levy is for purposes of general revenue, which, when collected, forms part of the public revenues of the State. In the matter of levy of a tax there is no question of any element of *quid pro quo* between the tax payer and the public authority. A third feature is that it is a part of the common burden, the quantum of the imposition depending generally upon the capacity of the taxpayer to pay. As distinct from a tax, a fee is charged for a special service rendered to individuals by some Governmental agency. They say (at page 295) :

> " The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases the costs are arbitrarily assessed. Ordinarily the fees are uniform and no account is taken of the varying abilities of different recipients to pay."

Finally they observe that an element of compulsion or coerciveness is present in all kinds of imposition though in different degrees and it is not totally absent in fees. This compulsion cannot therefore be made the sole or even material criterion for distinguishing a tax from a fee. In paragraph 46 of the judgment, they observe :

> " If as we hold, a fee is regarded as a sort of return or consideration for services rendered, it is absolutely necessary that the levy of fees should, on the face of the legislative provision, be correlated to the expenses incurred by Government in rendering the services."

Again, in pargaraph 48, they observe :

> " Our Constitution has, for legislative purposes, made a distinction between a tax and a fee and while there are various entries in the legislative lists with regard to the various forms of taxes, there is an entry at the end of each one of the three lists as regards fees which could be levied in respect of any of the matters that is included in it. The implication seems to be that fees have special reference to the governmental action undertaken in respect of any of these matters."

1. (1954) S.C.J. 335: (1954) 1 M.L.J. 596 : (1954) S.C.R. 1005 : A.I.R. 1954 S.C. 282.

It must be noted that this decision did not deal with fees taken in Courts but with fees charged charged by Government in respect of matters included in the legislative lists.

In *Khacheru Singh* v. *S. D.O., Khurja*[1], the question arose whether the levy of a fee of Rs. 50 on an application under Article 226 of the Constitution was valid. The Court-fees Uttar Pradesh Amendment Act, 1959, amended the provisions of the Court-fees Act of 1870. Under that Act, a Court-fee of Rs. 5 had to be paid on a petition presented to the High Court. By the Amendment Act, it was raised to Rs. 50 and it was contended that the levy was not a fee but a tax and was beyond the competence of the State Legislature. The validity of the levy of the fee was upheld. The learned Judges referred to the decision of the Supreme Court, but finally dealt with the matter on this basis. (at page 464):

> " Now, it is common ground in the present case that the fees realised under the Court-fees Act are not appropriated for any specific purpose, but form part of the general revenues of the State. It is therefore difficult to hold that fee under this Act (although undoubtedly a tax in the general sense of an imposition) is either a tax or a fee, as these terms have been defined in the case to which I have referred. It is not an exaction imposed without reference to any special benefit conferred on the payers, for it is imposed only on those persons who wish to file documents in a Court or to obtain copies of certain documents, the filing of the document or the obtaining of the copy being a direct benefit to the person concerned. It would appear therefore not to be a tax as so defined. Nor clearly is it a fee as so defined, if only for the reason that the moneys realised have not been set apart but have merged in the public revenue of the State."

Thereafter, they say that the definition of fee to be found in the Supreme Court cases was not intended to be exhaustive and that the fee in question was different from the type of fee which the Supreme Court had under consideration. The competency of the State Legislature to legislate in that regard was accordingly upheld. The only point to notice with regard to this decision is that whether the services rendered was commensurate with the fee charged was not specifically dealt with in this decision. What appears to have been argued is that for the reason that the fee realised was credited to the general revenue, it partook of the character of a tax and it was that contention that was repelled.

In *C. P. Syndicate Private Limited* v. *I. T. Commissioner*[2], the levy of a fee under the Bombay Court-fees Act XXXVI of 1959 in respect of an application made under section 66 of the Indian Income-tax Act was questioned. This levy was prescribed as one half of the *ad valorem* fee leviable on the amount in dispute, (*viz.*, the difference between the amount of tax actually assessed and the amount of tax admitted by the assessee as payable by him), subject to the minimum fee of Rs. 50. The contention that it was a tax and not a fee and was beyond the competence of the State Legislature was rejected. These contentions were however based on Article 14 of the Constitution and the claim of the petitioners was that they had a right to make an application under section 66 of the Income-tax Act, which was said to be a substantive right vested in them and which arose out of the assessment proceedings. It was urged that this right was impaired by the impugned provision in the Court-Fees Act. Though the learned Judges referred to several decisions, the question was not considered from the point of view of the benefit sought by the applicant or the fee charged as consideration for conferring that benefit. The conclusion was expressed by the learned Judges thus. (at page 114):

> " The learned Advocate-General in our opinion is right in saying that the levy of Court-fee for raising the general revenue has been authorised by the relevant entries in the legislative lists under the Constitution and the challenge therefore to the validity of such fees on the ground that they are not earmarked as a separate

1. A.I.R. 1960 All 462. 2. A.I.R. 1962 Bom. 106.

fund for the purposes of meeting the expenses of the services rendered cannot be sustained."

The learned Judges also observe. (at page 114) :

> "The fees collected under the Court-fees Act were always considered as raised for general revenue and went to the general public revenue. That the Court-fees Act was a measure for raising public revenue was held by the Privy Council in *Rachappa Subbarao* v. *Sidappa Venkatarao*[1],........ That the Court-fees Act was in essence a taxing statute and that the fees collected under the Act were for purposes of raising general public revenue has been the view expressed about the enactments in several judicial decisions."

The learned Judges referred to the Government of India Act and the entries in the lists therein as well as to the Seventh Schedule to the Constitution. They proceeded to say :—

> "As in Government of India Act, 1935, under the Constitution also, a distinction has been made between the Court-fees and the other fees. Article 146 and Article 229 again provide that the fees levied in Courts are to form part of the general revenue of the Union or the State as the case may be........ It is therefore clear that one of the essential elements laid down by the Supreme Court as the requisite of a fee, *viz.*,. that it must be appropriated to a separate fund earmarked to meet the expenses of the services, has never been true of the court-fees at any time and is also not true of the court-fees levied after the Constitution...."

It would be seen that the question was considered in the above decision not on the ground that the services rendered by the State were not proportionate to the quantum of the fee levied, but on the question that since the sums realised by court-fee were not separately kept from other public moneys, the levy ceased to bear the characteristics of a fee and became a tax. Under Article 266 of the Constitution, all revenues received by the Government of a State shall form part of the consolidated fund called 'the consolidated fund of a State'. The expression 'revenue' is a colourless one and would certainly include both a tax, which the Legislature of a State levied in the exercise of the powers conferred upon it by the relevant entries in List II of the Seventh Schedule, as well as all manner of fees, whether fees received in Courts or fees in respect of any matters in the List. But, undoubtedly, the Constitution itself makes a distinction between taxes and fees and the mere circumstances that all sums received by the State, whether as a tax or as a fee, enters into the consolidated fund cannot take away the special character of a fee and render the fees utilisable as a sum collected by way of tax. That is the principal argument advanced before me and I am not able to derive any assistance on that aspect of the matter from the above-cited decision.

The difference between a tax and a licence-fee was considered by a Bench of this Court in *Varadachari* v. *State of Madras*[2]. It was clearly laid down there that the licence fee is not intended to raise revenues for the general purposes of the authority levying the fee and that any levy intended for such purposes should be in the shape of a tax. It was also pointed out that a licence fee had to be reasonable while a tax need not be. In a decision of the Rangoon High Court, *Municipal Corporation of Rangoon* v. *The Sooratee Bara Bazaar Company Limited*[3], the power to impose a fee for licence on owners of private markets was considered and it was held that such power cannot extend to enacting a licence fee of any amount and that even the sanction by the Government to levy such a fee would not render it lawful. The limit to charge a fee would be set by the expenses of the Corporation in carrying out the duties imposed on it by the Act in supervision and regulation of private markets. In a decision of the Privy Council *The Pazundaung Bazaar Company Limited* v. *The Municipal Corporation, Rangoon*[4], it was decided that the fee charged in

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1. (1919) I.L.R. 43 Bom. 507.
2. (1952) 2 M.L.J. 410 : I.L.R. (1953) Mad. 217.
3. (1927) I.L.R. 5 Rangoon 212.
4. (1931) L.R. 58 I.A. 313 : (1931) 61 M.L.J. 740 (S.C.).

respect of licences need not be confined to the cost of the issue, and inspection of licences and the office expenses of the controlling authority. It may reasonably cover the cost of special services necessitated by the duties and liabilities imposed by the Corporation in respect of supervision and regulation of private markets. It was held that where a corporation had in good faith charged the fees and fixed an amount thereof on the footing that the sums paid would cover the cost aforesaid, it could not be held to be beyond the powers of the Corporation to exact payment of those fees. Though these decisions relate to other classes of fees than fees charged in Courts, the principle that a fee is levied only in consideration of certain special services and is not a tax which can be without any limit or which can also be linked to a person's ability to pay, seems to be made clear.

A recent decision of the Punjab High Court in *Delhi Cloth and General Mills* v. *Chief Commissioner*[1], dealt with the registration fee in respect of a debenture trust deed covering properties of the value of Rs. 2.5 crores. A registration fee exceeding Rs. 1.25 lakhs was demanded. This demand was attacked on the ground that the fee was wholly disproportionate to the services to be rendered under the Registration Act and that it was so excessive that it was really a tax and as such its levy was illegal. This contention was upheld. A slightly different view was expressed in *M. S. U. Mills Ltd.* v. *State of Rajasthan*[2]. That was a case of a licence fee demanded under the Indian Factories Act. The learned Judges while admitting the fact that a fee is not generally meant to augment general revenues but is levied for some service rendered by the State, proceed to say. (at page 180):

> " This distinction however is not always kept in mind rigorously in legislative enactments and many a time what is called a fee is really a tax meant for raising revenues........ So far as fees are concerned, they have to be divided into parts. There are some fees which are really taxes though they are called fees. In their case all the incidents of a tax apply and the limitations to which fees are subject do not apply. As an example of this kind, we may mention court-fees under the Court-fees Act. Though it may be said that court-fees are charged from parties who come to Court, it is still true that the Court-Fees Act, generally speaking, is a measure for raising revenue for the State. Then, there are fees strictly so called, which are not meant for raising revenue but for meeting the expenses of the departments of the Government created for regulating professions, trades, callings and employments, from which licence fees are levied.........."

With respect, I am unable to agree to the statement that the Court-fees Acts are instruments through which general public revenues of the State are intended to be raised.

It would certainly appear to follow from a consideration of the several decisions and the precise division between taxes and fees that is the essence of the legislative lists, that a fee cannot notwithstanding it is " revenue " which the State receives, transgress beyond the limits of the characteristics of a fee and take on the proportions of a tax. The learned Advocate-General does not deny that Court-fees is only a fee and cannot be regarded as a tax. He has referred to the decision of the Supreme Court in *Sri Sudhindra Tirtha Swamiar* v. *Commissioner, Hindu Religious and Charitable Endoments*[3]. That was a case of contributions levied under the Hindu Religious and Charitable Endowments Act. The provisions of the Act had been enacted with the object of establishing a distinct fund out of the income of the endowments and unrelated to the general revenues of the State. Section 82 of the Act XIX of 1951 as amended by Act XXVII of 1954, provided for the recovery of contributions on the same scale as it had been obtaining previously. Their Lordships observe. (at page 975):

> " It is true that contributions levied under section 76 (1) of the Act before it was amended had the characteristic of a tax and the levy thereof was accordingly

1. A.I.R. 1964 Punj 492.
2. A.I.R. 1954 Raj. 178.
3. A.I.R. 1963 S.C. 966.

struck down. But the Legislature had power to enact appropriate retrospective legislation declaring these levies as fees by denuding them of the characteristics which went to make the levies of the nature of a tax..........Retrospectively, the payments received by the Government were disassociated from the general Governmental revenues and by sub-section (2) of section 82, account was to be made on the footing that these payments constituted a distinct and separate fund........"

They upheld the levy in the instant case as covered by the appropriate entry in the Seventh Schedule, but pointed out that the levy was for rendering services in connection with the supervision over religious institutions. I am unable to see to what extent this decision can support the contentions of the State. What all it lays down is merely that it is not a postulate of a fee that it must be related to the actual services rendered by the authority to each individual and that a fee need not necessarily be uniform. But undoubtedly, their Lordships insisted that there should be a reasonable relation between the levy and the expenses incurred for rendering services.

If the history of the legislation all over the country during the past century is to be any guide, it has always been recognised that a flat rate of Court-fee on claims of whatever amount would not be consistent with the principle that the fee is to be a rough equivalent of the services rendered. Undoubtedly, for services of an identical nature, the suitor with a large claim is called upon to pay a much heavier fees than one with a smaller claim. Though a strict equivalence between the fee and the service may not be possible and cannot be demanded, the levy of such fees as the Court-fees Act of 1955 contemplates discloses even on their face that the court-fee levied on higher claims is wholly disproportionate to the services rendered.

I have referred to the fact that the State purports to contend that as against a total receipt of fees of this description of Rs. 125 lakhs, the administration of justice involves the expenditure of nearly Rs. 130 lakhs. To these figures exception has been taken, for, in the broad classification of administration of justice, the expenditure relevant to the administration of criminal justice as well as payments made to Governmental legal agencies are also included. It is the contention of Mr. V. K. Thiruvenkatachari that the administration of criminal justice is one of the primary functions of the State and that the expenditure on this head should be met from the general revenues derived by taxation. The administration of criminal justice is a benefit to every citizen and not only to a civil suitor. A civil suitor in common with other citizens pays taxes to the extent to which he is called upon to pay them. He contributes in a manner of speaking to the expenses of the administration of criminal justice independently of any amount which he might have to pay when he approaches civil Courts for relief. It is accordingly the contention that Court-fees which are derived only from civil suitors should not be regarded as a fund from out of which the general expenses of the State's administration, particularly in relation to the administration of criminal justice, should be met. There is undoubtedly considerable force in this contention. If these expenses are excluded, it would certainly show a large volume of surplus remaining out of the realisations of court-fees after defraying the expenditure of administration of civil justice.

The question raised before me is one of considerable importance and though I have expressed some tentative conclusions on some aspects of the arguments advanced, I deem it desirable that the matter should receive consideration by a Bench. The view expressed in the several decisions referred to are by no means uniform and there are observations here and there which support the contention of the State that a Court-fees Act can be regarded as a measure for raising general public revenues. Why a court-fee should be anything more than what a fee connotes must depend on an examination of the principle involved, which can best be done by a Bench. The papers will be placed before the Honourable the Chief Justice for suitable orders.

(In pursuance of the above Order of Reference, the petitions were heard by a Bench, *Veeraswami* and *Natesan, JJ.*)

V. K. Thiruvenkatachari, for *A. R. Ramanathan*, for Petitioner in W.P. No. 1743 of 1964 and for *G. Ramaswami* for Applicant in Application No. 2445 of 1965.

S.V. Subrahamanyam for *Subbaraya Aiyar, Sethuraman* and *Padmanabhan*, for Applicant in Application No. 2486 of 1964.

V. Thyagarajan and *M. A. Srinivasan*, for Petitioner in W.P. No. 3891 of 1965.

K. S. Naidu, for Plaintiff in Diary No. 4359 of 1965.

V. Srinivasan, for Plaintiff in Diary No. 6672 of 1966.

The Advocate-General and Assistant Government Pleader, for Respondents in W.P. Nos. 1743 of 1964, and 3891 of 1965.

L. V. Krishnaswamy Iyer, for Respondents 1 and 2 in Application No. 2486 of 1964.

V. Thyagarajan and *M. A. Srinivasan* for Respondents 3 to 8 in Application No. 2486 of 1964.

The Advocate-General and *K. Venkataswami*, for the Additional Government Pleader, for State.

The Order of the Court was made by

*Natesan, J.**—These cases raise an interesting and somewhat difficult question of the constitutional validity of the High Court-Fees Rules, 1956, which came into force on the 1st day of January, 1957. Known as the High Court-Fees Rules, 1956, it incorporates the provisions of the Madras Court-fees and Suits Valuation Act, XIV of 1955, which has been statutorily made applicable for suits and proceedings instituted in the High Court in its Original Jurisdiction also, and the attack is directed against the validity of Article I, Schedule I of the said Act, which provides for an uniform *ad valorem* fee without limit at 7½ per cent. on all plaints or written statements pleading a set-off or counter-claim or memoranda of appeal. Except W.P. No. 3891 of 1965 the other cases were heard by our learned brother Srinivasan, J., and the matter referred to a Bench, as the questions involved have posed a variety of opinion and are of considerable importance.

The circumstances under which the question gets posed may first be briefly set out. By W.P. No. 1743 of 1964 the petitioner, who has to file a suit for reliefs valued at Rs. 2,06,552 and would be affected by the levy, seeks the issue of a writ of *mandamus* or other direction or order, declaring the relevant rules relating to the levy of fees on *ad valorem* scale invalid and *ultra vires* and for a direction to the Registrar of the High Court to levy fees in suits and appeals in the Original Side of the High Court in accordance with the Court-fees Act, 1870, as amended in 1922, and applicable to proceedings in the High Court in its Original Jurisdiction before the High Court-Fees Rules, 1956, came into force. The petitioner in W.P. No. 3891 of 1965 is an applicant for probate in O.P. No. 124 of 1965 in the Original Jurisdiction of this Court and caveat has been entered in the matter. As under the rules regarding Court-fees, as they now stand, if caveat is entered and the application for probate registered as a suit, one half of the scale of fees on *ad valorem* scale on the market value of the estate, less the fee already paid on the application for probate, is levied, the petitioner has come out with the application for relief similar to the one claimed in W.P. No. 1743 of 1964. By application No. 2445 of 1964, the plaintiff in C.S. No. 43 of 1961, who had to pay a Court-fee of Rs. 26,000-75 claims refund of the Court-fee paid, as an illegal exaction. Similar relief is prayed for in Application No. 2486 of 1964 by the plaintiff in C.S. No. 7 of 1959 who had to pay a Court-fee of about Rs. 19,500. It is stated for these petitioners that they limit their claims for refund to the excess over and above what they would have paid under the Court-fees Rules prior to the introduction of the new Rules in 1956 and the application of the Madras Court-fees and Suits Valuation Act, 1955.

* 31st March, 1967.

It is needless to refer in greater detail to the facts. The power of the High Court to levy fees on suits and proceedings presented in its Original Jurisdiction is not questioned. What is stressed before us is the scope and content of that power and the limitations on its exercise. In suits on the Original Side previously only a very light institution fee was payable, and further fees were collected for subsequent proceedings in the matter, and also hearing fees for the time taken by the High Court in adjudging causes. For the first hearing of every suit the fee payable was Rs. 10 and for every day subsequent to the first, a fee of Rs. 20 was payable. The initial levy was gradually raised, and under the High Court Fees Rules, 1933, the institution fee, where the value of the subject-matter of the suit did not exceed Rs. 2,500 was Rs. 225 and for every thousand rupees or part thereof in excess of Rs. 2,500 a fee of Rs. 5 had to be paid. Of course, fees on the further proceedings in the suit and hearing fees had to be paid, the hearing fee being as before Rs. 10 for the first day and Rs. 20 for the subsequent days. In 1949 the fee payable in the High Court in its Original Jurisdiction was brought in line with the fees payable in the other civil Courts, by R.O.C. No. 2219 of 1949, which added to Order 2, rule 1 of the High Court-Fees Rules, 1933, the following:

> "To other documents including Memoranda of appeals the Registrar shall apply so far as may be the law for the time being in force relating to Court-fees, as regards the scale of such fees, the manner of levy of such fees, the refund of such fees and in every other respect, in the manner and to the extent that it is applicable to similar documents filed in original proceedings in a District Court and in appeals from decrees and orders of a District Court."

The result was to apply the Court-Fees Act VII of 1870 as amended in Madras in 1922, to proceedings in the High Court in its Original Jurisdiction also. Under the Court-Fees Act, 1870, current till it was amended in Madras in 1922, the fee was levied at $7\frac{1}{2}$ per cent. on the value of the subject-matter of claims upto Rs. 1,000; between Rs. 1,001 and Rs. 5,000 the rate was 5 per cent.; between Rs. 10,000 and Rs. 20,000 it was 3 per cent.; between Rs. 20,000 and Rs. 30,000 it was 2 per cent.; and thereafter upto Rs. 50,000 it was 1 per cent. For all claims above Rs. 50,000 the rate was $\frac{1}{2}$ per cent. of the claim in excess of Rs. 50,000, and the maximum fee leviable was also fixed, namely, Rs. 3,000. The Madras Court-Fees Act, 1922, while raising the percentage and levy, retained the slab system. the rate tapering off as the value of the subject-matter went up. The fee on a claim for Rs. 50,000 was Rs. 1,762-7-0 and above Rs. 50,000 for every Rs. 5,000 or part thereof in excess a Court-fee of Rs. 30 was payable. The levy now impugned under the High Court-Fees Rules, 1956, which came into operation on the first day of January, 1957, is found under Order 2, rule 1 of the High Court Fees Rules, 1956, which runs:

> "The fee in all suits and proceedings instituted on or after the 19th day of May, 1955, and all proceedings by way of appeal or otherwise arising therefrom shall be levied by the Registrar, Sheriff and the Reserve Bank of India, as the case may be, according to the provisions of the Madras Court-fees and Suits Valuation Act XIV of 1955, and the rules framed thereunder, and according to the scale of fees set out in Appendix II hereto, upon the several documents, matters and transactions specified as chargeable thereon. The fees chargeable to Government shall be charged by the Reserve Bank of India and credited to Government."

The Madras Court-Fees and Suits Valuation Act, 1955, made applicable to proceedings on the Original Side has completely recast the basis of levy of court-fees. The slab system and the tapering scale on the slabs has been given up and a uniform levy of $7\frac{1}{2}$ per cent. *ad valorem* on the subject-matter of the claim without limit has been introduced. No maximum is fixed on the court-fee payable and the result is, whereas previously on a claim for Rs. 50,000, the court-fee payable was Rs. 1,762-7-0, the court-fee payable under the new rule is Rs. 3,750; and while, previously on a claim of rupees one lakh, the court-fee payable was Rs. 2,062-7-0 now a court-fee of Rs. 7,500 has to be paid. In probate matters previously in proceedings in the High Court on the application for probate, a fee of Rs. 25 was

payable, and when it was converted on entry of caveat into a testamentary suit, a hearing fee of Rs. 10 was payable for the first day, and thereafter Rs. 20 for every succeeding day. Under the new rules, on the entry of caveat and the application getting converted into a testamentary suit, court-fee is payable on the value of the estate at one half of the scale of fees prescribed in Article I, Schedule I of the Court-Fees and Suits Valuation Act, 1955, less the fee paid on the application for probate. It is in these circumstances that the several suitors in the above matters, who have been either compelled to pay or called upon to pay heavy amounts as court-fees are challenging the levy as a highly arbitrary and oppressive exaction, not authorised by law. The contention is that what can be levied and may be levied is only a fee and not a tax, while what is levied though termed fee, in fact, is a tax.

Prior to the Court-Fees Act of 1955 the source of the High Court's power to settle a table of Court-Fees in proceedings before the Court was traced to section 15 of the Charter Act (1861) 24 and 25 Vict. 104, clause 37 of the Letters Patent of this Court, and sections 106 (1) and 107 (*e*) of the Government of India Act, 1915, corresponding to sections 223 and 224 of the Government of India Act, 1935. The matter is not *res integra* and is covered by decisions, to refer to the more recent: *Seshadri* v. *Province of Madras*[1], *Satyanarayanamurthi* v. *Income-tax. Appellate Tribunal*[2]. Article 225 of the Constitution preserved the pre-existing power of the High Court to make rules of Court and prescribe court-fees. Under this Article any rule made by the High Court will not have legal authority if the Legislature made a law on the same subject, and now the Legislature of the State while not exempting under section 2 of the Court-Fees Act, 1955, proceedings in the original jurisdiction of the High Court from the applicability of the Act, by section 4 has enacted that no document which is chargeable under the Act shall be filed, exhibited or recorded in or be acted upon or furnished by any Court including the High Court unless in respect of such document, there be paid a fee of an amount not less than that indicated as chargeable under this Act. But the power to levy the court-fee whether it is exercised by the High Court or by the Legislature is subject to the provisions of the Constitution and the head of legislation under which the levy of fees in Courts may be and is sought for the State to be sustained is Entry 3 in List II of the Seventh Schedule of the Constitution. It would be convenient here to set out the said Entry in the State List.

> "*Seventh Schedule—List II—State List*: *Entry* 3.—Administration of Justice; constitution and organisation of all Courts, except the Supreme Court and the High Court; officers and servants of the High Court; procedure in rent and revenue Courts; fees taken in all Courts except the Supreme Court."

The precise head of power under which the levy could be sustained being Entry 3 above set out, the argument of learned Counsel appearing for the suitors based thereon may first be briefly indicated. Learned Counsel contends that the demand of court-fee to be legal must be a fee and not a tax and what is to be looked for to scrutinise its validity is its substance and not the form or the nomenclature under which it is made. A fee properly so called, learned Counsel point out, is a levy for special services required by or given to the assessee and must bear reasonable relation to the cost of the services, while a tax is a levy for raising revenues for the general purposes of the State. It is submitted that the Court-fee now demanded is really a tax on litigation for the general purpose of the State and that Court-fee has ceased to be the fee it was intended to be. It is stated that administration of justice is one of the principal functions of the State and that while the suitors in general may not grudge to bear any reasonable fee that may be charged when they approach the Court, the present levy when the value of the subject-matter of the litigation is fairly high becomes wholly incommensurate with the requirements of the occasion. Court-fee according to Counsel has become a tax on litigation and litigants, not the subject of any particular legislative head under the Lists: Parlia-

1. (1954) 1 M.L.J. 206 : I.L.R. (1954) Mad. 643.
2. (1957) 1 An.W.R. 360 : A.I.R. 1957 A.P. 123.

ment alone would have the power to impose such a levy under Article 248 (2) and Entry 97 of List I. Learned Counsel contend that as the demand assumes staggering proportions as the value of the claim goes up, it is regressive in its effect and keeps out *bona fide* suitors from seeking justice through Courts and vindicating their rights. It has become a weapon in the hands of defendants to coerce settlement of lawful claims at low figures. A suitor may not be able to find the exorbitant court-fees though he would be considered a man of means if it comes to a question of his seeking leave to sue *in forma pauperis*. The *ad valorem* scale without an upper limit is wholly unreasonable and could not be justified. It can have no relation to the time taken in Court or the services rendered to the suitor. The claim may be on a hundi or negotiable instrument for one lakh of rupees and it may be disposed of *ex parte*, or it may be a commercial cause for a like amount where the defence is nominal, and the whole matter is over in little or no time. Still the suitor will have to pay a Court-fee of Rs. 7,500 and there may be another claim by the same suitor for one thousand rupees and the hearing of the suit may go on for days with innumerable witnesses and scores of documents all on a court-fee of Rs. 75. It will be no answer to the disproportionate incidence that the plaintiff could recover his costs from the defendant. The demand is on the suitor, be it plaintiff or defendant; it is the cause that brings them before the Court and the question is whether any rational basis could be found for a flat rate *ad valorem* levy without limit. The pattern of levy for nearly a century has been to provide a regulated scale of fees, the percentage of levy getting lower and lower as the value of the claim went up, ultimately becoming nominal. That was the best that could be done as a practical way of equitably distributing the cost of administration of justice. Learned Counsel attack the *ad valorem* scale of fees under the Court-Fees Act, 1955, as irrational, wholly unjustified and not called for by any increase in the cost of administration of civil justice. It is stated that the State appears to have proceeded in the view that the suitor in the civil Court will have to compensate the Government for its expenses incurred not only in the administration of civil justice, but also expenses incurred by the State in the administration of justice in the criminal Courts. The State would further have the litigant pay the expenses of the State's own law officers.

On behalf of the State in the original counter affidavit filed by the Joint Secretary to the Revenue Department the attempt was to justify the increase of court-fees in 1955 under the Act of 1955 by reference to certain figures of receipts from Courts and costs of the administration of justice. It was pleaded that the rates prescribed in the Court-Fees Act XIV of 1955 were not excessive, that there was justification for the increase in 1955 and that the levy was not a tax on litigants. However, after the matter was referred to a Bench, on behalf of the State, Counsel for the suitors were informed and notice given that in addition to the aforesaid defence, it would be argued that the levy of court-fees need not be in proportion to the services rendered and that, on the contrary, a levy of court-fee for raising general revenue is permissible. The main contention of the learned Advocate-General, now appearing for the State, was that the fee levied in Courts does not belong to the class of fees which have to be commensurate with the services rendered and to sustain whose validity they must be correlated with the services rendered. It was submitted that the fees levied in Courts are, and have always been, treated on a different footing from all other fees, and that the element of *quid pro quo* should not be looked for in fees levied in Courts. It was further submitted that the fees collected under the Court-Fees Act had always been treated in the past as part of the public revenues. Before us further statements of receipts and expenditure in relation to administration of justice in the State have been filed at the instance of the Advocate-General, and we will be referring to the same in due course. The points raised require detailed and careful consideration.

To start with it is agreed on all sides that the only head of legislation in the State List, List II of the Seventh Schedule, under which the levy could be sustained, is Entry 3 already set out. It is necessary in this context to refer to Entry 77 of List I relating to fees taken in the Supreme Court. It runs thus:

"*List I, Entry* 77 : Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein ; persons entitled to practise before the Supreme Court."

Entry 3 of List II authorises laws with respect to "fees taken in all Courts except the Supreme Court." The expression is 'fees' and not 'taxes,' and the Constitution, under its several provisions makes a distinction between fees and taxes. In List I—Union List, Entries 1 to 81 mention the several matters over which Parliament has authority to legislate, and Entries 82 to 92-A enumerate the taxes which can be imposed by the Union Parliament. In the State List, Entries 1 to 44 form a group giving the State heads of general legislation, and Entries 45 to 62 deal with State taxes. While Entry 96 in the Union List provides for laws relating to fees in respect of any of the matters in the Union List, but not including fees taken in any Court, Entry 66 of the State List relates to fees in respect of any of the matters in the State List, but not including fees taken in any Court. When we come to the concurrent list, there is no provision for taxes, and Entry 47, provides for fees in respect of any of the matters in the concurrent list, but not including fees taken in any Court. Taxation, it will be seen, is not intended to be covered under the main heads of legislation, but is treated as a distinct matter for the purpose of legislative competence. Even so, specific power is given to impose fees in relation to matters in the several lists. There could be fee even in relation to a tax law.

The well-marked distinction which the Constitution makes between fee and tax found in the three legislative lists may be noticed also in Articles 110 and 199 of the Constitution. While Article 109 (1) provides that a Money Bill shall not be introduced in the Council of State, Article 110 (2) provides,

"A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes."

Similarly, in relation to the States, while Article 198 (1) prohibits the introduction of a Money Bill in a Legislative Council, Article 199 (2) *inter alia* states that a Bill shall not be deemed to be a Money Bill by reason only that it provides for the demand or payment of fees for licences or fees for services rendered. Article 277 states:

"Any taxes, duties, cesses or fees which, immediately before the commencement of this Constitution, were being lawfully levied by the Government of any State or by any municipality or other local authority or body for the purposes of the State, municipality, district or other local area may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Union List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by Parliament by law."

It may be that, generally speaking, the word "fee" has no rigid meaning, and it may be that it is occasionally found used, while the more appropriate word would be tax. But, as will be seen presently, in taxation parlance, the expression 'fee' has acquired a distinct concept, and the Constitution has made a clear distinction between fees and taxes when conferring legislative powers. It is, therefore necessary to examine first the content of the expression 'fee' and 'tax'. Cooley defines 'tax' as

"burdens or charges imposed by legislative power upon persons or property, to raise money for public purposes."

Freely expressed, taxation is the raising of money for the purpose of Government by means of contributions from individual persons. The Supreme Court has adopted the definition of tax given by Latham, C.J., of the High Court of Australia in *Matthesus* v. *Chicory Marketing Board*[1]:

1. 60 Com. L.R. 263 at 276.

" A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered."

It is pointed out by Mukherjee, J. (as he then was) in *Commissioner of Hindu Reilgious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Sirur Mutt*[1] (the first *Sirur Mutt case*):

" This definition brings out, in our opinion, the essential characteristics of a tax as distinguished from other forms of imposition which, in a general sense, are included within it. It is said that the essence of taxation is compulsion, that is to say, it is imposed under statutory power without the tax-payer's consent and the payment is enforced by law."

A reference to Lutz on Public Finance would show that fees as opposed to taxes are distinguished by this that the ruling principle is special payment for special services. While the duty to pay taxes generally follows from the fact of membership in the State, the duty to pay fees arises only as a result of making a special demand. Generally speaking, it may be said that, where fees are charged for any service and are not intended to exceed the cost of the service, the fees charged for practical purposes, do not constitute taxation. No doubt, in its widest and broadest sense, taxation would include levy of fees. Article 366 (28) of the Constitution defines ' taxation ' as including the imposition of any tax or impost, whether general or local or special, and ' tax ' shall be construed accordingly. But when the fees charged are raised to such an extent as to far exceed the value of the services, and to contribute substantially to the general revenues of the State, in effect it becomes a tax. In the first *Sirur Mutt Case*[1], where the validity of the levy of contribution under the Madras Hindu Religious and Charitable Endowments Act, by section 76 of the Act, was questioned, the distinction between ' tax ' and ' fee ' is thus brought out :

" It seems to us that though levying of fees is only a particular form of the exercise of the taxing power of the State, our Constitution has placed fees under a separate category for purposes of legislation and at the end of each one of the three legislative lists, it has given a power to the particular Legislature to legislate on the imposition of fees in respect to every one of the items dealt with in the list itself. Some idea as to what fees are may be gathered from clause (2) of Articles 110 and 199 referred to above which speak of fees for licences and for services rendered."

After pointing out that the characteristic of tax is that the levy is for the purpose of general revenue which, when collected, forms part of the public revenues of the State, that the object of the tax is not to confer any specific benefit upon any particular individual, that there is no element of *quid pro quo* between the tax-payer and the public authority, and that it is a feature of taxation that it is part of the common burden and the quantum of imposition upon the tax-payer depends generally upon his capacity to pay, it is stated :

" Of course, in some cases whether a man would come within the category of a service receiver may be a matter of his choice, but that by itself would not constitute a major test which can be taken as the criterion of this species of imposition (fee). The distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of a common burden, while a fee is a payment for special benefit or privilege. Fees confer a special capacity, although the special advantage, as for example in the case of registration fees for documents or marriage licences, is secondary to the primary motive of regulation in the public interest. (*Vide* Findlay Shirras on Science of Public Finance, Volume I, page 202). Public interest seems to be at the basis of all impositions, but in a fee it is the special bene-

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1. (1954) S.C.J. 335 : (1954) 1 M.L.J. 596 at 615 : (1954) S.C.R. 1005 : A.I.R. 1954 S.C. 282.

fit which the individual receives. As Seligman says, it is the special benefit accruing to the individual which is the reason for payment in the case of fees : in the case of a tax, the particular advantage if it exists at all is an incidental result of State action. (*Vide* Seligman's Essays on Taxation, page 408.)

If, as we hold, a fee is regarded as a sort of return or consideration for services rendered, it is absolutely necessary that the levy of fees should, on the face of the legislative provision, be co-related to the expenses incurred by Government in rendering the services. As indicated in Article 110 of the Constitution, ordinarily there are two classes of cases where Government imposes 'fees' upon persons. In the first class of cases, Government simply grants a permission or privilege to a person to do something, which otherwise that person whould not be competent to do and extracts fee either heavy or moderate from that person in return for the privilege that is conferred..........

In other class of cases, the Government does some positive work for the benefit of persons and the money is taken as the return for the work done or services rendered. If the money thus paid is set apart and appropriated specifically for the performance of such work and is not merged in the public revenues for the benefit of the general public, it could be counted as fees and not a tax. There is really no generic difference between the tax and fees and as said by Seligman, the taxing power of a State may manifest itself in three different forms known respectively as special assessments, fees and taxes. (*Vide* Seligman's Essays on Taxation, page 406.)

Our Constitution has, for legislative purposes, made a distinction between a tax and a fee and while there are various entries in the legislative lists with regard to various forms of taxes, there is an entry at the end of each one of the three lists as regards fees which could be levied in respect of any of the matters that is included in it. The implication seems to be that fees have special reference to governmental action undertaken in respect to any of these matters."

In that case their Lordships affirmed the decision of this Court striking down the contribution levied under section 76 of the Madras Hindu Religious and Charitable Endowments Act as a tax and not a fee and as beyond the legislative power of the State. Section 76 which was struck down authorised the levy of an annual contribution on all religious institutions, the maximum being fixed at 5 per cent. of the income derived by them. In striking down the levy as unconstitutional, the Supreme Court observed (page 296):

"It may be noticed, however, that the contribution that has been levied under section 76 of the Act has been made to depend upon the capacity of the payer and not upon the quantum of benefit that is supposed to be conferred on any particular religious institution. Further the institutions which come under the lower income group and have income less than Rs. 1,000 annually, are excluded from the liability to pay the additional charges under clause (2) of the section. These are undoubtedly some of the characteristics of a 'tax' and the imposition bears a close analogy to income-tax. But the material fact which negatives the theory of fees in the present case is that the money raised by levy of the contribution is not earmarked on specified for defraying the expenses that the Government has to incur in performing the services. All the collections go to the Consolidated Fund of the State and all the expenses have to be met not out of these collections but out of the general revenues by a proper method of appropriation as is done in case of other Government expenses. *That in itself might not be conclusive, but in this case there is a total absence of any co-relation between the expenses incurred by the Government and the amount raised by contribution under the provision of section* 76 and in these circumstances the theory of a return or counter-payment of *quid pro quo* cannot have any possible application to this case."

The validity of the levy came up again for consideration after certain amendments were made by the Government to section 76. The levy by the amendment was constituted into a separate fund and the amounts raised specifically earmarked for defraying expenses for rendering services. They did not go into the consolidated fund of the State, but were included in a separate fund and the contributions were payable to the Commissioner under the Act. There was no reliable evidence of the absence of any correlation between the expenses incurred and the amounts collected as contributions. The validity of the amended legislation was upheld by the Supreme Court in *Sudhindra Thirtha Swamiar* v. *Commissioner, Hindu Religious and Charitable Endowments*[1], the Supreme Court observing (at page 976) :

> " The State Legislature has power to levy a fee under the Seventh Schedule, List III, Entry 28 read with Entry 47. The Legislature was, therefore, competent to levy a fee for rendering services in connection with the maintenance, supervision and control over the religious institutions and it was competent to levy the fee retrospectively."

Their Lordships again in this decision reiterated the several characteristics of ' fee ' in the following terms (at page 975) :

> " A levy in the nature of a fee does not cease to be of that character merely because there is an element of compulsion or coerciveness present in it, nor is it a postulate of a fee that it must have direct relation to the actual services rendered by the authority to each individual who obtains the benefit of the service. If with a view to provide a specific service, levy is imposed by law and expenses for maintaining the service are met out of the amounts collected there being reasonable relation between the levy and the expenses incurred for rendering the service, the levy would be in the nature of a fee and not in the nature of tax. It is true that ordinarily fee is uniform and no account is taken of the varying abilities of different recipients. But absence of uniformity is not a criterion on which alone it can be said that it is of the nature of a tax. A fee being a levy in consideration of rendering service of a particular type, correlation between the expenditure incurred by the Government and the levy must undoubtedly exist, but a levy will not be regarded as a tax merely because of the absence of uniformity in its incidence, or because of compulsion in the collection thereof, nor because some of the contributories do not obtain the same degree of service as others may."

The distinction maintained in the Constitution in relation to legislative powers between a tax and a fee was again emphasised by the Supreme Court when affirming the validity of the contribution levied on public trusts in the State of Bombay under the Bombay Public Trust Act, 1950. The contributions with certain other specified sums under the Act made up the Public Trusts Administration Fund to be applied for payment of charges incidental to the regulation of public trusts and for carrying into effect the provisions of the Act. Speaking for the Court, Mukherjea, J. (as he then was), observed in that matter, *Ratilal* v. *State of Bombay*[2]:

> "We may start by saying that although there is no generic difference between a tax and a fee and in fact there are only different forms in which the taxing power of a State manifests itself, our Constitution has in fact, made a distinction between a tax and a fee for legislative purposes............ There is no doubt that a fee resembles a tax in many respects and the question which presents difficulty is what is the proper test by which one could be distinguished from the other? A tax is undoubtedly in the nature of a compulsory exation of money by a public authority for public purposes, the payment of which is enforced by law. But the other and equally important characteristic of a tax is that the imposition is made for public purpose to meet the general expenses of the State without reference to any special advantage to be conferred upon the payers of the tax...... Fees

1. A.I.R. 1963 S.C. 966.
2. (1954) 1 M.L.J. 718 at 727 : (1954) S.C.J. 480 : (1954) S.C.R. 1055 : A.I.R. 1954 S.C. 388 at 395.

on the other hand, are payments primarily in the public interest, but for some special service rendered or some special work done for the benefit of those from whom the payments are demanded. Thus in fees there is always an element of *quid pro quo* which is absent in a tax. It may not be possible to prove in every case that the fees that are collected by the Government approximate to the expenses that are incurred by it in rendering any particular kind of services or in performing any particular work for the benefit of certain individuals. But in order that the collections made by the Government can rank as fees, there must be co-relation between the levy imposed and the expenses incurred by the State for the purpose of rendering such services. This can be proved by showing that on the face of the legislative provision itself, the collections are not merged in the general revenue but are set apart and appropriated for rendering these services.

Thus two elements are essential in order that a payment may be regarded as a fee. In the first place, it must be levied in consideration of certain services which the individuals accepted either willingly or unwillingly and, in the second place the amount collected must be earmarked to meet the expenses of rendering these services and must not go to the general revenue of the State to be spent for general public purposes."

The classification by the Constitution for legislative purposes of impost as tax and fees, with their characteristics was again stated by the Supreme Court in *Sri Jagannath* v. *State of Orissa*[1], the Court pointing out:

"Thus in fees there is always an element of *quid pro quo* which is absent in a tax. Two elements are thus essential in order that a payment may be regarded as a fee. In the first place, it must be levied in consideration of certain services which the individual accepted either willingly or unwillingly. But this by itself is not enough to make the imposition a fee, if the payment demanded for rendering of such services are not set apart or specifically appropriated for that purpose but are merged in the general revenue of the State to be spent for general public purposes."

We would like to point out here that what would make a levy cease to be a fee is not just its merger in the general revenues of the State, but the emphasis is on its merger for being spent for general public purposes, with no intention to appropriate it for purposes of the service to be rendered.

In *State of Orissa* v. *Chakobhai Ghelabhai & Co.*[2], the Supreme Court affirmed the distinction between a tax and a fee considered in *Commissioner, Hindu Religious and Charitable Endowments* v. *Sri Lakshmindra Thirtha Swamair*[3], and upheld the levy that was in question in that case, fees for appeals and applications in revision under the Orissa Sales Tax Act, as within the competence of the provincial Legislature pointing out that the fees imposed by the rule in question were for services rendered by the governmental agency and that though ordinarily fees were uniform, there would be various kinds of fees and it was not possible to formulate a definition that would be applicable to all cases. In that case, on every memoranda of appeal against an order of assessment or penalty or application for revision or review of such order, a fee calculated at 5 per cent. of the amount in dispute subject to a maximum of Rs. 100 and a minimum of Re. 1 was provided for.

In *Hinger-Rampur Coal Co.* v. *State of Orisssa*[4], the validity of cess levied under the Orissa Mining Areas Development Fund Act had to be considered—whether it was a tax of a duty of excise or a fee. Gajendragadkar, J. (as he then was), who read the judgment for the majority of the Court, examining the prior decisions of the Court observed:

1. (1954) 1 M.L.J. 591 at 595: (1954) S.C.J. 329: (1954) S.C.R. 1046: A.I.R. 1954 S.C. 400 at 403.
2. (1961) 2 S.C.J. 95: (1961) 1 S.C.R. 719: A.I.R. 1961 S.C. 284.
3. (1954) 1 M.L.J. 596: (1954) S.C.J. 335: (1954) S.C.R. 1005: A.I.R. 1954 S.C. 282.
4. (1961) 2 S.C.R. 537: A.I.R. 1961 S.C. 459 at 464.

"In regard to fees there is, and must always be, co-relation between the fee collected and the service intended to be rendered. Cases may arise where under the guise of levying a fee Legislature may attempt to imposed a tax ; and in the case of such a colourable exercise of legislative power Courts would have to scrutinise the scheme of the levy very carefully and determine whether in fact there is a co-relation between the service and the levy, or whether the levy is either not co-related with service or is levied to such an excessive extent as to be a pretence of a fee and not a fee in reality........ The distinction between a tax and a fee is however, important and it is recognised by the Constitution."

Dealing with the challenge to the levy in that case, based on the form in which the levy was imposed, it was stated (at page 469) :

"Therefore, in our opinion, the mere fact that the levy imposed by the impugned Act has adopted the method of determining the rate of the levy by reference to the minerals produced by the mines would not by itself make the levy a duty of excise. The method thus adopted may be relevant in considering the character of the impost, but its effect must be weighed along with and in the light of the other relevant circumstances."

The distinction between a tax and a fee has again been the subject of consideration by the Supreme Court in *Corporation of Calcutta* v. *Liberty Cinema*[1]. In that case the licence fee on a cinema house fixed in 1948 at Rs. 400 per year was increased to Rs. 6,000 in the year 1958 by changing the basis of assessment. The relevant provision of the Calcutta Municipal Act, 1951, which authorised the levy, was section 548, and the Court (the majority) took the view that the levy authorised by section 548 was a tax and not a fee in return for services to be rendered by the Corporation, and that, therefore, no question arose in the case of correlating the amount of the levy to the cost of the services. The legislative power was there whether the levy was a tax or a fee. It was observed in that case that the Act in question used the word 'fee' indiscriminately, and that the provision for the imposition of licence fee did not necessarily lead to the conclusion that the fee must be only for services rendered, as the word 'fee' in the Act was held not conclusive of the character of the levy. The question whether the fee contemplated by the section was a fee in return for services was decided by reference to the terms of the section, and the absence of any provision for the rendering of any service by the Corporation (at page 1116) :

"Whether a particular levy is a fee or tax has to be decided only by reference to the terms of the section as we have earlier stated. Its position in the Act cannot determine its nature : an imposition which is by its terms a tax and not a fee, which in our opinion the present imposition is, cannot become a fee by reason of its having been placed in a certain part of the statute.......We are clear in our mind that if looking at the terms of the provisions authorising the levy it appears that it is not for special services rendered to the person on whom the levy is imposed, it cannot be a fee wherever it may be placed in the statute.

* * * * *

The conclusion to which we then arrive is that the levy under section 548 is not a fee as the Act does not provide for any services of special kind being rendered resulting in benefits to the person on whom it is imposed."

In the light of the above decisions it is difficult to accept any argument that the word 'fees' used in Entry 3 of List II should not be given its limited meaning as impost for services sought or rendered. We cannot ignore plain language in heads of legislation, Entry 96 of List I, Entry 66 of List II, and Entry 47 of List III, excepting fees taken in any Court. In the context of the user, the fees excepted cannot be a different kind. The part separated may be presumed to be of the same brand as the whole. Reference may also be made here to Entry 44 of List III—

1. (1965) 2 S.C.R. 477 : A.I.R. 1965 S.C. 1107.

stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty. Tax is a genus of which fee is a species, and when we are on the content of legislative powers under the head ' fees ' in a Constitution, where legislative powers are distributed between the Provinces and the Union, we cannot too readily ignore the accepted connotation of the expression ' fees '. The Constitution itself has indicated the scope of the expression ' fee ' in Articles 110 and 199; fees may be for licences or for services rendered. When a power to tax is given it is practically unlimited, in force. When the power granted is just taxation, it would cover every conceivable exaction which it is possible for a Government to make, whether in the name of a tax or any such names as rates, assessments, duties impost, excise, licences, fees or tolls. In our view, when the Constitution under a particular head does not grant a general power to tax, but limits and circumscribes the grant to the particular species, fees, and empowers only levy of fees, the power given cannot in its exercise be equated to the general power of taxation with all its consequences. The distinction between power of taxation in general and limited powers of taxation becomes material when legislative power gets distributed or is delegated. The separation in powers in regard to taxes and fees as now found is first brought out in the Government of India Act of 1935, when legislative powers, were divided between the Federal Legislature and the Provinces. The present Constitution has continued and maintained the distinction. We shall presently be examining the argument for the State based on the separation of fees taken in Courts from the head of legislation for fees in general in respect of matters in the several lists. The further contention that the Court-Fees Act is a taxing statute, that the fees collected thereunder have always been for raising revenue for the State and that legislative history and judicial decisions relating to court-fees have always treated it as a source of general revenue, thereby giving the word ' fee ' in the phrase ' fees taken in Courts ' a meaning all its own, calls for examination of the question whether the distinction between fees and taxes, maintained in the Constitution, is without difference when it comes to levy of fees in Courts.

Where the Legislature is vested with absolute jurisdiction, the laws promulgated by it could take effect according to the language in which it is expressed liberally construed. When the legislative powers are varied and distributed under different heads of legislation, then it becomes necessary to examine with strictness the substance of the legislation for the purpose of determining what it is the Legislature is doing and under which power it is acting. The materials placed before us show that even prior to the Constitution, and even prior to the Government of India Act, 1935, distinction between fee and tax was observed, though it often got blurred, where the distinction could have no material significance. Under the Government of India Act, 1935, Entry 59, List I of the Seventh Schedule, provided for fees in general in respect of matters in the list, but not including fees taken in any Court. Under section 214 of the Act the Federal Court was empowered to make rules as to the fees to be charged in respect of proceedings in that Court. Entry 1 of List II of the Act related to the constitution and organisation of all Courts except the Federal Court and fees taken therein, and Entry 54 of List II contained the general head ' fees ' in respect of any of the matters in List II, but not including fees taken in any Court. The Entries, in List III, 25 and 36, while providing for fees in respect of the matters in the List excepted from the head of legislation fees taken in any Court. Corresponding to Articles 110 and 199 of the present Constitution, there were sections 37 and 82, excepting fees for licences or fees for services rendered, from the concept of Money Bills. Section 136 of the Act defined the revenues of the Federation and the revenues of the provinces as including all revenues and public moneys raised or received by the Federation or by the Provinces, as the case may be. It is relevant at this stage to point out that in the British Parliament also the distinction between fees and taxation in general, is kept up. A ways and means resolution is a necessary preliminary there to the imposition of new taxes, the continuation of an expiring tax, an increase in the rate of an existing tax, or the extension of the

incidence of a tax so as to include persons not already payers. In May's Parliamentary Practice, Fifteenth Edition, page 765, it is found stated:

"Payments which are intended to cover the expenses of a Government department in performing services for the public or sections of the public and are retained by the department, are not regarded as charges. Such payments may take the form of fees or licences.

This rule is not allowed to legitimise charges so disproportionate to the cost of the services rendered as to amount to taxation.

The Speaker has ruled that, in the case of a licence granted by a Government department, the payment charged for the issue of the licence, if it is a small fee of an administrative character, should not be considered a charge upon the subject necessitating a ways and means resolution, but that if the fee charged did more than this, a ways and means resolution would be necessary. If the fees are payable into the Exchequer a ways and means resolution is rendered necessary."

It is seen at page 783 that the Commons which had claimed the exclusive right in respect of legislation over charges imposed upon the people, formerly extended the claim to the imposition of fees and pecuniary penalties and to the mode of suing for fees and penalties and their application when recovered, denying the Lords the power to deal with these matters. Finding the rigid enforcement of this claim inconvenient, in 1849 the Lords were given the power by a standing order (now No. 55) to deal by bill or amendment with pecuniary penalties, forfeiture of fees, when the object of such penalties or forfeitures was to secure the execution of an Act, and when the fees imposed were not payable into the exchequer, or in aid of the public revenue.

We may remark here that the Court-Fees Act of 1955 was admittedly not introduced as a Money Bill. Of course, this is not of much importance, and cannot affect the real character of the levy. Before the distribution of legislative powers the distinction between fee and tax could arise, and have arisen, when local authorities were delegated the power of fixing rates in respect of imposts and levying licence fees. When the Legislature itself had plenary powers of taxation, it would matter little whether the levy exceeded the limits of the impost as fee properly so called. But when the Legislature authorised the levy, and left it to a local authority or other body, then the question can arise whether the delegated authority had exceeded its powers. If the Legislature had sanctioned only a fee, and the delegated authority in excess of its powers under the guise of a fee had provided for an exaction which in reality would be a tax, then it would be *ultra vires* the local authority. If what had been authorised was a fee, then there has to be correlation between the income and the expenditure. The Court in such a case should scrutinize the reasonableness of the levy and strike down the levy if it had exceeded the bounds of a fee. The question in this form arose for consideration before the Rangoon High Court in *Municipal Corporation of Rangoon* v. *The Sooratee Bara Bazaar Co., Ltd.*[1], on the claim of the Corporation of the City of Rangoon under the City of Rangoon Municipal Act to exact as licence fee any amount. The Court held that the intention of the Legislature was not to give the Corporation power to impose on owners of private markets a charge for a licence which might extend to any amount for which the sanction of the local Government could be obtained, but to limit it to charge a fee which would cover the expenses of the Corporation in carrying out the duties imposed on it by the Act, of the supervision and regulation of private markets. Cunliffe, J., in the Court of first instance observed (at page 221):

"I am of opinion that the rule levying such a high licensing fee upon the plaintiffs for the occupation of their bazaars amounts not to a proper and reason-

1. (1927) I.L.R. 5 Rang. 212.

able fee such as was contemplated but does in fact amount to the infliction of an unauthorised tax."

The Division Bench (Rutledge, C. J., and Brown, J.), after quoting from Maxwell the well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties, and the subject is not to be taxed unless the language of the statute clearly imposes the obligation, observed (at page 228):

"The question must be decided by the intention of the Legislature. Was it the intention to give the Corporation power to impose on the owners of private markets a charge for a licence which might extend to any amount for which the sanction of the local Government could be obtained? Or was the intention merely to give power to charge a fee which would save the Corporation from being out of pocket by reason of the duties and liabilities imposed on it by Act of the supervision and regulation of private markets? In our opinion some more definite words than the general words of section 178 (3) are necessary before we can read into the words the former intention."

Section 178 (3) referred to there ran thus:

"For every such licence or permission a fee may be charged at such rate as shall from time to time be fixed by the Corporation."

The levy in question was struck down as subordinate legislation which was *ultra vires*. The Corporation had been empowered to levy only a fee, but it was exacting a tax.

The governing Constitution then, was the Government of India Act of 1919 with diarchy in the Provinces. The subjects of administration were divided into two categories, central and provincial by the rules known as the Devolution Rules. The sources of revenue were also divided and the Provincial Legislature was empowered to present its own budget and levy its own tax relating to the provincial sources of revenue. It could not, under section 80-A of the Act, without the previous sanction of the Governor-General, make or take into consideration any law imposing or authorising the imposition of any new tax, unless the tax was one scheduled as exempted from the provisions of the rules made under the Act. The heading of Schedule II of the "Scheduled Taxes Rules" provided that in the Schedule the word 'tax' included cess, rate, duty or fee. In the List of provincial subjects in the Government of India Act, 1919, item 20 is described thus:

"Non-judicial stamps, subject to legislation by the Indian Legislature, and judicial stamps, subject to legislation by the Indian Legislature, as regards amount of Court-Fees levied in relation to suits and proceedings in the High Courts under their Original Jurisdiction."

Reference is made to these aspects to emphasise that 'fee' as such, though a form of taxation in its wider sense, had for long received a significance all its own, and has generally been understood as an impost severely restricted in its scope and operation. It might be that occasionally statutes levying imposts have not always maintained the distinction, and the expression 'fee' might have been used loosely while intending a tax and in any given case, when the question arose as to what had been intended, the substance of the levy had been scrutinised. But when a fundamental document like the Constitution, in defining legislative powers, uses a particular expression in more than one place, and the expression has a significance of its own, it should ordinarily receive the same meaning wherever it is found unless the context or setting compels or necessitates otherwise.

The learned Advocate-General strongly relies on two features relating to Court-fees as placing it in a different category and making the tests in regard to the validity of a fee inappropriate. The first argument is that fees taken in Courts are specially

taken out of the general category of fees in Entry 66. It is said that the expression ' fees taken in any Court ' has not been the subject of consideration by the Supreme Court, and that, when their Lordships of the Supreme Court were pointing out the distinction between ' fees ' and ' taxes ' it was with reference to the Entries 96 in List I, 66 in List II and 47 in List III. Fees taken in Courts, according to the learned Advocate-General, are a class of imposition by themselves, and though called fees, differ from the type of fees referred to in the decisions of the Supreme Court. True, the framers of the Constitution, and the Constitution Act of 1935, have separated fees taken in Courts from other fees, and made it a distinct head of legislative power. But in our view they were familiar with the generally recognised usage of the expression, and, if a valid legislative purpose is apparent in separating fees taken in Courts from other fees, we should be going against the ordinarily accepted canons of construction, if we hold that the expression ' fees ' in Entry 3 in List II, does not carry its normally accepted connotation. The purpose in separating fees taken in Courts from other fees is obvious. Now, an action in a civil Court in respect of any matter may invite the consideration of more than one law and several laws would be involved. A single suit relating to immoveable property may necessitate the consideration of the Succession Act, the Transfer of Property Act, the Contract Act, the Stamp Act, Registration Act, Evidence Act, and various other laws. If the Legislature fixes a fee in respect of a Court action with reference to every law it makes, it will lead to utter confusion. Fees will have to be calculated and levied under the several Acts, and it may not be apparent when the suit is instituted as to what laws would come up for consideration in the action. Frequently new legal problems become apparent only during the course of the trial or at the stage of arguments, and quite often at the appellate stage. By separating fees taken in Courts from the general power for levying fees in respect of matters in any list, and providing for a single head of legislation for fees in Courts, confusion and practical difficulty in the matter of levy and collection of Court-fees are avoided. By investing the power under one head, the method of levying fee for Court action is simplified. Fees have been taken in Courts always when the proceedings were initiated, generally on the document presented in Courts. The Constitution has taken a pragmatic approach in this regard when distributing legislative powers, and therefore, in our view, the mere fact that fees taken in Courts are made a separate head of legislation cannot alter the innate character of the levy as a fee. If the Constitution makers did not intend to give the expression ' fees ' in Entry 3 of List II the same connotation as it had in Entry 66 of the List, they could have adopted any other synonym of tax. Of course, fees may be of various kinds, and they may have special features of their own, and so fees taken in Courts may have certain special characteristics having regard to the occasion of the levy, the manner of the levy, and other related matters. But the core of the expression will not be lost by reason only of certain special features attaching to the levy.

We shall take up the next argument of the learned Advocate-General, that fees taken in Courts cannot be considered to be fees in the technical sense, as under the Constitution they have to form part of the Consolidated Fund. It is urged that, for an impost to be a fee levied as such for services rendered, it should be earmarked to meet the expenses of rendering services and must not go into the general revenues of the State. The Advocate-General refers to Articles 146 and 229 of the Constitutions. Referring to the Supreme Court, Article 146 (3) runs :

> "The administrative expenses of the Supreme Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of the State, and any fees or other moneys taken by the Court shall form part of that Fund."

Based on these Articles, it is stressed that the fees taken by the Courts have to go into the Consolidated Fund of India or the State, as the case may be ; they cannot be credited to any separate fund, and so lack the *sine quo non* for a fee. It is urged

that the Constitution itself does not provide for fees taken in Courts maintaining an essential element of a 'fee' properly so called, that it should be earmarked and credited to a separate fund. Therefore, it is said the Constitution marks out fees taken in Courts, from the other fees. This feature, it is stated, makes it a tax, though called a fee. The question for consideration is whether it is an essential and necessary element of a fee properly so called that it should be credited or capable being credited to a separate fund and should not fall into the Consolidated Fund. It may be convenient to read here Article 266 of the Constitution :

" *Article* 266 (1) : Subject to the provisions of Article 267 and to the provisions of this Chapter with respect to the assignment of the whole or part of the net proceeds of certain taxes and duties to States, all revenues received by the Government of India, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled "the Consolidated Fund of India ", and all revenues received by the Government of a State, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled "the Consolidated Fund of the State."

(2) All other public moneys received by or on behalf of the Government of India or the Government of a State shall be credited to the public account of India or the public account of the State, as the case may be.

(3) No moneys out of the Consolidated Fund of India, or the Consolidated Fund of a State, shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution."

Instances of 'all other public moneys' referred to in clause (2) are to be found in Article 284 :

" All moneys received by or deposited with—

(*a*) any officer employed in connection with the affairs of the Union or of a State in his capacity as such, other than revenues or public moneys raised or received by the Government of India, or the Government of the State, as the case may be, or

(*b*) any Court within the territory of India to the credit of any cause, matter, account or persons."

In our view, it is not an essential element for a levy to be a fee that it must be separately funded and dealt with . Only separate funding will be presumptive proof that the levy is a fee. For a fee to retain its character as 'fee' correlation has to be established between the law which is contended to be a fee and the expenses incurred by the State for purposes of rendering the related services, and, as pointed out by the Supreme Court in *Ratilal* v. *State of Bombay*[1], 'this can be proved by showing that on the face of the legislative provision itself, the collections are not merged in the general revenue but are set apart and appropriated for rendering these services."

In *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar*[2], referring to the fact that the contribution levied under section 76 of the Hindu Religious and Charitable Endowments Act went into the consolidated fund of the State, and the expenses were met, not out of the collections, but out of the general revenues by appropriation as in the case of other Government expenses, it is observed by the Supreme Court :

" That in itself might not be conclusive, but in this case there is total absence of any co-relation between the expenses incurred by the Government and the amount raised by contribution........"

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1. (1954) S.C.J. 480 : (1954) 1 M L J. 718: (1954) S.C.R. 1055 : A.I.R. 1954 S.C. 388.

2. (1954) S.C.J. 335 : (1954) 1 M.L.J. 596 : (1954) S.C.R. 1005 : A.I.R. 1954 S.C. 282-296.

It follows that, if otherwise correlation could be established, the levy could be shown to be a fee, and the mere fact that it goes into the consolidated fund would not take away its character as a fee, if otherwise it is a fee. In *Hingir-Rampur Coal Co.* v. *State of Orissa*[1], this aspect noticed by Mukherjea, J., (as he then was) in the above case is referred to.

In *State of Orissa* v. *Chakobhai Chelabhai & Co.*[2], already referred to, the fees levied under rule 59 of the Orissa Sales Tax Rules, 1947, were challenged as an illegal levy, and a direction for refund of the fees paid was prayed for. The rule in question enabled the levy of a fee of 5 per cent. of the amount in dispute calculated to the nearest rupee subject to a maximum of Rs. 100 and a minimum of Re. 1 on a memorandum of appeal against order of assessment or penalty or both, or on application for revision or review of such order. The levy under consideration was under Item 54 of List II of the Government of India Act, 1935. The High Court had struck down the levy as illegal, and the Supreme Court, while agreeing with the High Court that the assessing authorities were not Courts, held that it did not necessarily follow that the fees imposed were illegal. It was observed that the Legislature had power to make a law for tax on sale of goods and for fees in respect thereof, under Items 48 and 54 of List II of the Government of India Act, 1935, that the fees imposed were not taxes, and that it came within the provision in section 29 of the Orissa Sales Tax Act, which enabled the State Government to make rules ' prescribing the procedure for and other matters (including fees) incidental to the disposal of appeals and applications for revision and review under section 23 of the said Act'. It was pointed out that the procedure for disposal of an appeal included as a necessary incidental matter the filing of an appeal on a proper fee. We are referring to this case, as the fees collected under the relevant provisions were not separately shown in the budget, but were included in the Consolidated Fund of the State. The amounts collected by way of fees by the Sales Tax authorities were merged in the Consolidated Fund. The High Court had upheld the contention of the assessee that the fees collected were additional taxes and not fees. This may be seen from the following extract from the judgment of the High Court in *M/s. Chakko Bhai* v. *State of Orissa*[3] :

" Mr. Mohanty has taken considerable pains to satisfy us that the amounts collected by way of fees by the sales tax authorities are merged in the Consolidated Fund of the State and are not charged merely for the services rendered.

It would appear that these fees are collected as additional taxes and not as fees which are separately shown in the budget, but are included in the Consolidated Fund of the State. I am therefore satisfied that the levy of fees on a graded scale on appeals and applications for revision or review amounts in the circumstances, to the imposition of a tax which is clearly unwarranted and is beyond the rule making power of the State Government ".

The fact that the fees collected went into the Consolidated Fund did not at all weigh with the Supreme Court, and notwithstanding that they went into the Consolidated Fund, the validity of the levy as fees was upheld. As pointed out by the Supreme Court, there may be various kinds of fees and it is not possible to formulate a definition that would be applicable to all cases.

In the dissenting judgment in *Corporation of Calcutta* v. *Liberty Cinema*[4], Rajagopala Ayyangar, J., speaking for himself and Subba Rao, J., (as he then was), observed (at page 1125) :

" The segregation of the Fund, therefore, could not have been a decisive factor for determining the nature of the levy."

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1. (1961) 2 S.C.R. 537 : A.I.R. 1961 S.C. 459, 464.
2. (1961) 2 S.C.J. 95 : (1961) 1 S.C.R. 719 : A.I.R. 1961 S.C. 284,
3. A.I.R. 1956 Orissa 7 at 11.
4. (1965) 2 S.C.R. 477 : A.I.R. 1965 S.C. 1107.

Of course, the matter was being considered from the other angle, namely, whether the mere fact of the segregation of the fund from the Consolidated Fund would make the levy not a tax for the principle would be the same, and on this aspect of the discussion we do not find any different opinion expressed by the majority of the Court.

It must be noticed that in every one of the cases before the Supreme Court, wherever their Lordships applied the test of merger of the collection in the general revenues of the State, they referred to its consolidation with the general revenues of the State to be spent for general public purposes. No doubt, when the moneys pass into the Consolidated Fund their identity would be lost. But there can be no difficulty in the State earmarking the collections for any particular purpose or services rendered by the State. The following observation of Latham, C.J., in what is known as the *Uniform Tax Case*[1], is appropriate in this context:

"All taxation moneys must pass into the Consolidated Revenue Fund, where their identity is lost, and whence they can be taken only by an Appropriation Act. An appropriation Act could provide that a sum measured by the receipts under a particular tax Act should be applied to a particular purpose, but this would mean only that the sum so fixed would be taken out of the general consolidated revenue."

Where no question of excessive execution arises, and the levy realised could be related to the services rendered by the Governmental agency, as in the case of *State of Orissa* v. *Chakobhai Chelabhai & Co.*[2], notwithstanding that the levy was absorbed in the Consolidated Fund, it could be validated as a fee. May be the rationale behind Articles 146 (3) and 229 (3) is fundamental recognition that the cost of administration of justice is properly charged on the general revenues of the State and that it would be inappropriate for any civilised State to require the High Courts and the Supreme Court to pay themselves from fees realised from suitors. The judicial department of the State which has to administer laws promulgated by the Legislature and render justice to the wronged, according to the law of the realm, is an esssential limb of any modern State and will have to be maintained whether there are suitors to pay for its upkeep or not. A skeletal judiciary at least will be in the interests of the community as a whole and a public purpose. In our view, the second argument based on Articles 146 and 229 of the Constitution, providing for fees taken in Courts to form part of the Consolidated Fund, to impart to fees taken in Courts the character of taxation, also fails.

The decision of the Privy Council in *Attorney-General for British Columbia* v. *Esquimalt and Nanaimo Railway Co.*[3], an appeal from the Supreme Court of Canada, was cited. The question that arose therein for consideration was whether a particular levy was service charge or a tax. The relevant Act prohibited that certain lands shall not be subject to taxation. Lord Greene, speaking for the Court, observed:

"There is no context to give to the word "taxation" any special meaning, and the question therefore comes to this: Is the impost charged by section 124 of the Forest Act 'taxation' within the ordinary significance of that word?.... Section 124 provides that from the owners of timber land there shall be payable and paid to the Crown on the first day of April in each year an annual tax at the rate of six cents for each acre. These payments are to be placed to the credit of a fund in the Treasury to be known as the forest protection fund and are made recoverable by action at the suit of the Crown. An annual sum of $1,650,000 is to be added out of the consolidated revenue fund. Advances may be made out of the consolidated revenue fund to meet the charges incurred before the full collection of tax or to cover deficiencies. In the case of a deficiency or a surplus there is power to increase or decrease the levy as the case may be. The forest protection fund is applicable for a variety of purposes connected with the protection of forest lands, including the maintenance and equipment of fire-prevention

1. (1942) 65 Com. L.R. 373 at 414.
2. (1961) 2 S.C.J. 95: (1961) 2 S.C.R. 719: A.I.R. 1961 S.C. 284.
3. L.R. (1950) A.C. 87.

and protection force, the construction of trails, look-out stations, etc., and the payment of expenditure incurred by any person in fighting fires. The Legislature has thus thought it proper to divide the expense of what is a public service of the greatest importance to the Province as a whole between the general body of tax-payers and those individuals who have a special interest in having their property protected. The levy has what are, undoubtedly, characteristics of taxation, in that it is imposed compulsorily by the State and is recoverable at the suit of the Crown. It is suggested, however, that there are two circumstances which are sufficient to turn the levy into what is called a 'service charge'. They are, first, that the levy is on a defined class of interested individuals and, secondly, that the fund raised does not fall into the general mass of the proceeds of taxation but is applicable for a special and limited purpose. Neither of these considerations appears to their Lordships to have the weight which it is desired to attach to them. The fund is made up partly of the levy and partly by contributions from the taxes paid by the general body of taxpayers. This is no doubt a reasonable apportionment of the burden, for to impose the cost of services which are of general interest to the community as well as a particular interest to a class of individuals exclusively on one or the other might well have seemed oppressive. The fact that in the circumstances the persons particularly interested are singled out and charged with a special contribution appears to their Lordships to be a natural arrangement. Nor is the fact that the levy is applicable for a special purpose of any real significance. Imposts of that character are common methods of taxation—taxation for the road fund in this country was a well-known example. The objects of the Legislature in adopting such a form of tax may be various. But if it finds it convenient to do so the impost, if in other respects it has the character of a tax, does not thereby change its character."

We do not find anything in these observations of the learned Law Lord to persuade us to hold that fees taken in Courts should be considered taxation with all its incidents under our Constitution. The Judicial Committee specifically points out that there was nothing in the context to give to the word 'taxation', which they were interpreting, any special meaning.

Adverting to this case, Gajendragadkar, J. (as he then was), speaking for the majority in *Hingir-Rampur Coal Co., Ltd.* v. *State of Orissa*[1], observed:

"The Privy Council did consider two circumstances which were relevant; the first that the levy was on a defined class of interested individuals, and the second that the fund raised did not fall into the general mass of the proceeds of taxation but was applicable for a special and limited purpose. It was conceded that these considerations were relevant but the Privy Council thought that the weight to be attached to them should not be exaggerated. In appreciating the weight of the said relevant circumstances the Privy Council was impressed by the fact that the lands in question formed an important part of the national wealth of the Province and their proper administration, including in particular protection against fire, is matter of high public concern as well as one of particular interest to individuals. In other words, the effect of the impugned provision was that the expenses of what was the public service of the greatest importance for the province as a whole had been divided between the general body of taxpayers and those individuals who had a special interest in having their property protected. It would thus appear that this decision proceeded on the basis that what was claimed to be a special service to the lands in question was in reality an item in public service itself, and so the element of *quod pro quo* was absent. It is true that when the Legislature levies a fee for rendering specific services to a specified area or to a specified class of persons or trade or business, in the last analysis such services may indirectly form part of services to the public in general. If the special service rendered is distinctly and primarily meant for the benefit of a specified class or

1. (1961) 2 S.C.R. 537 : A.I.R. 1961 S.C. 459, 465.

area the fact that in benefiting the specified class or area the State as a whole may ultimately and indirectly be benefited would not detract from the character of the levy as a fee. Where, however, the specific service is indistinguishable from public service, and in essence is directly a part of it, different considerations may arise. In such a case it is necessary to enquire what is the primary object of the levy and the essential purpose which it is intended to achieve. Its primary object and the essential purpose must be distinguished from its ultimate or incidental results or consequences. That is the true test in determining the character of the levy. "

We may also refer to the decision of the Judicial Committee in *Attorney-General for Quebec* v. *Walter Reed*[1], a case under the British North America Act, from the Supreme Court of Canada. Therein a Quebec Act, which imposed a duty of 10 cents upon every exhibit filed in Court in any action, depending therein was held *ultra vires* of the Provincial Legislature. The taxing powers in Canada are divided between the Dominion and Provinces. The Dominion's power extends to any mode or system of taxation, while that of the Province is restricted to direct taxation within the province in order to the raising of revenue for provincial purposes. The question has often arisen in Canada as to whether a particular levy was direct or indirect taxation. It must also be borne in mind that the Dominion like our centre, had residuary powers of taxation. A direct tax, it has been held, is one which is demanded from the very person who it is intended and desired should pay it, while indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another. After holding that the levy in question was not direct taxation, the Lord Chancellor, the Earl of Selbourne addressed himself to the question whether it would come under sub-section (14) of section 92 of the British North America Act, which dealt with the exclusive powers of the provincial legisltures. Sub-section (14) runs thus :

" The administration of justice in the province, including the constitution, maintenance, and organisation of provincial Courts, and including the procedure in civil matters in the Courts."

It was observed (at page 144) :

" Now it is not necessary for their Lordships to determine whether, if a special fund had been created by a provincial Act for the maintenance of the administration of justice in the provincial Courts, raised for that purpose, appropriated to that purpose, and not available as general revenue for general provincial purposes, in that case the limitation to direct taxation would still have been applicable. That may be an important question which will be considered in any case in which it may arise ; but it does not arise in this case. This Act does not relate to the administration of justice in the province ; it does not provide in any way, directly or indirectly, for the maintenance of the provincial Courts ; it does not purport to be made under that power, or for the performance of that duty. The subject of taxation, indeed, is a matter of procedure in the provincial Courts ; but that is all. The fund to be raised by that taxation is carried to the purposes mentioned in the 2nd sub-section ; it is made part of the general consolidated revenue of the province. It, therefore, is precisely within the words ' taxation in order to the raising of a revenue for provincial purposes '. *If it should greatly exceed the cost of the administration of justice, still it is to be raised and applied to general provincial purposes, and it is not more speciallty applicable for the administration of justice than any other part of the general provincial revenue.*

Their Lordships, therefore, think that it cannot be justified under the 14th sub-section."

The emphasis is ours, the argument before us being that the levy from the civil suitors greatly exceeds the cost of administration of civil justice, and is also utilised for the maintenance of law and order, a general public purpose.

1. (1885) L.R. 10 A.C. 141.

Reference was also made in the course of the arguments for the State to another decision of the Privy Council under the British North America Act, in *George Walkem* v. *Lower Mainland Dairy Products Board*[1], where Lord Atkin had observed :

"If regulation of trade within the province has to be held valid the ordinary method of regulating trade, *i.e.*, by a system of licences, must also be admissible ....A licence fee, though usual, does not appear to be essential. But if licences are granted it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the province or for both purposes. The object would appear to be in such a case to raise a revenue for either local or provincial purposes ....It cannot, as their Lordships think be an objection to a licence plus a fee that it is directed both to the regulation of trade and to the provision of revenue. It would be difficult in the case of saloon and tavern licences to say that the regulation of the trade was not at least as important as the provision of revenue. And if licences for the specified trades are valid their Lordships see no reason why the words 'other licences' should not be sufficient to support the enactment in question. The impugned provisions can also, in their Lordships' opinion, be supported on the ground accepted by Martin, C.J., in his judgment on the reference, *viz.*, that they are fees for services rendered by the province or by its authorised instrumentalities under the powers given by section 92 (13) and (16)."

The above observations are not of general applicability and have to be related to the provincial heads of legislation under section 92 of the British North America Act. Under section 92 (9) the provinces may legislate in relation to "shop, saloon, tavern, auctioneer and other licences in order to the raising of a revenue for provincial, local or municipal purposes." The head of legislation authorises legislation for provincial revenues in relation to licences also. The problem that had arisen in Canada was (i) whether the phrase 'other licences' had to be read *ejusdem generis* with the preceding enumeration; (ii) whether the revenue raising provisions of licensing legislation should conform to the standards of direct taxation; and (iii) whether the province could license for regulatory rather than, of for regulatory as well as, revenue purposes. It is now established that the *ejusdem generis* rule does not apply to 'other licences,' and where the licensing system, establishedf or regulatory purposes, also exhibited a revenue purpose by reason of the exaction of licence fees, resort could be had to section 92 (9), and that it was not necessary in this connection to meet the requirements of direct taxation. The case above referred to cannot therefore be authority under our Constitution for taxation measures for general revenue purpose under the head of 'fees'.

We shall now take up the argument for the State that the history and legislative practice and judicial dicta with reference to the levy of fees in Courts is to treat the fees taken in Courts as a category by itself and as a source also of general revenues of the provinces. In *Henrietta Muir Edwards* v. *Attorney-General of Canada*[2], where the question was whether in section 24 of the British North America Act, 1867, the word 'person' would include a 'woman,' the Privy Council said (at page 127) :

"In coming to a determination as to the meaning of a particular word in a particular Act of Parliament, it is permissible to consider two points, *viz.*, (i) The external evidence derived from extraneous circumstances such as previous legislation and decided cases, (ii) The internal evidence derived from the Act itself. As the learned Counsel on both sides have made great researches and invited their Lordships to consider the legal position of women from the earliest times, in justice to their arguments they propose to do so............"

But it is also clear that the Privy Council is of the view that while history may be called in aid to show what facts existed to bring about a statute, the inferences to

1. (1938-39) F.L.J. 147 : A.I.R. 1939 P.C. 36-38.
2. L.R. (1939) A.C. 124.

be drawn therefrom are slight. While the language is plain, legislative history cannot avail for a different interpretation.

Considerable reliance is placed for this contention on the decision of the Judicial Committee in *Rachappa Subbarao Jadhav* v. *Shidappa Venkatarao Jadhav*[1], where it is observed:

" The Court Fees Act was passed not to arm a litigant with a weapon of technicality against his opponent but to secure revenue for the benefit of the State. This is evident from the character of the Act, and is brought out by section 12 which makes the decision of the first Court as to value final as between the parties, and enables a Court of appeal to correct any error as to this, only where the first Court decided to the detriment of the revenue. The defendant in this suit seeks to utilise the provisions of the Act not to safeguard the interests of the State, but to obstruct the plaintiff; he does not contend that the Court wrongly decided to the detriment of the revenue, but that it dealt with the case without jurisdiction."

Their Lordships of the Judicial Committee were, in that case, not on the question of any distinction between a fee and tax. The defendant in that case objected to the jurisdiction of the Court in which the suit was instituted. It was his case that it was not properly brought in the Court of the First Class Subordinate Judge The objection was not taken in the written statement or at the settlement of issues or in the defendant's appeal to the District Judge or in the High Court. The defendant sought to question the jurisdiction of the Court by reference to the court-fee which had been paid on the plaint, and the observations of the Privy Council were in that context. It must further be noticed that the word ' revenue ' is colourless in its import and all receipts from whatever sources would be revenue. Their Lordships did not say that the Court Fees Act was passed for raising revenue for the general purposes of the State.

In Anson's Law and Custom of the Constitution, Volume II, Part II, Fourth Edition, referring to the expression ' revenue ', it is stated (page 146) :

" The so-called revenues of the Crown are for the most part the sums paid, in various forms, by the people for the maintenance or promotion of the various objects for which the Government exists."

At page 171 is found the following:

" Other departments receive moneys directly or indirectly in the course of their business from fees, the sale of old materials, or similar sources. Sometimes these are used by the department as ' appropriations in aid ' of the amount granted by Parliament to meet departmental expenditure. Sometimes they are paid into the Exchequer and then falls under the head of revenue described in the Finance accounts as ' miscellaneous'."

As pointed out in an earlier part of the judgment, from the standpoint of the State, the distinction between fees and taxes will be of little significance when the State is possessed of plenary powers of taxation. The distinction between the various forms of taxation, using the word in its widest sense, gets practical importance only when legislative powers are distributed. In a Federal Constitution, where the legislative powers have been distributed between the Provinces and the Federation the competence of the Legislature to enact a particular legislation or make a levy would depend upon whether the topic of legislation or power of levy has been assigned by the Constitution to that Legislature.

Reference has also been made to certain observations of the eminent Judge, Mahmood, J., in *Muhammad Salim* v. *Nabian Bibi*[2], *Balkaran Rai* v. *Gobind Nath Tiwari*[3], and *Radha Bai* v. *Nathuram*[4]. The question that arose for consideration

1. (1919) L.R. 49 I.A. 24 to 32 : (1919) 36 M.L.J. 437 (P.C.).
2. (1886) I.L.R. 8 All. 282.
3. (1890) I.L.R. 12 All. 129.
4. (1891) I.L.R. 13 All. 66.

in *Muhammad Salim's case*[1], was whether the dismissal of a former suit of the plaintiff therein under section 10 of the Court Fees Act could be regarded as *res judicata*, barring the subsequent action. It is in this connection that the learned Judge observed that the dismissal of a suit under section 10 of the Court Fees Act could never operate as *res judicata*, so as to bar a fresh action. He said (at page 286):

> " Now what I wish to say in the first place is that the object of these provisions, as indeed of the whole Act, is to lay down rules for the collection of one form of taxation, and this I regard to be the scope of the enactment, though it contains no preamble at all................"

It cannot be denied that, in one sense, fees are a form of taxation.

In *Balkaran Rai's case*[2], the learned Judge said (at page 164) :

> " My difficulty further arose from the circumstance that I felt, in the absence of a preamble in this Court Fees Act, whether it was intended to regulate question of procedure or to regulate the method of the collection of revenue, that is to say, fiscal questions for the pruposes of the obtainment of money from the tax-payer in order to achieve such results as the State had in view to carry on the administration of the country."

The learned Judge lower down refers to these levies as ' law taxes ' and would follow the views of Jeremy Bentham that

> " the more stringent they are, the less do they achieve their aim, for they are stringent not in the interests of justice, but make the administration of justice difficult and in many cases impossible."

Again in *Radha Bai* v. *Nathu Ram*[3], the learned Judge observed that the Indian population had been taxed by the Court Fees Act.

In our view, the expression ' taxation ' in these decisions has been used only in a generic sense. There was no need to examine the special character of the levy. The Court Fees Act was a fiscal Act, and this was emphasised with particular reference to the hardship which it caused the suitors. The same is the case in regard to the observations of Rankin, C.J., " The Court Fees Act is a taxing statute" in *Shihan* v. *Abdul Alim*[4], The learned Judge made that observation to point out that the Court Fees Act has to be considered with strictness and that it was passed not to arm a litigant with a weapon of technicality against his opponent, but to secure revenue for the benefit of the State, referring to the decision of the Judicial Committe in *Rachappa Sub Jadhav Rao* v. *Shidappa Venkatarao Jadhav*[5].

We may now refer to the line of cases, where the levy of court-fees is regarded as taken for services rendered by the Courts. In *Gavaranga Sahu* v. *Botokrishna Patro*[6], where a question arose, whether the validity of a plaint for the purposes of section 4 of the Limitation Act (1887) depended on its validity for the purpose of the Court Fees Act (1870), it was observed:

> "One of its (Court Fees Act) main purposes, no doubt, is to levy fees for services to be rendered by Courts and public officers, and the plaint is not to be effectual for such purposes until it is duly stamped."

With reference to the fees levied in High Courts the position appears to be clear. Coutts Trotter, J. (as he then was), examining the power of the High Court in the matter of levying fees, in *Mahomed Ishack Sahib* v. *Mahomed Moideen*[7], said.

> " It is, I think, reasonably clear that that part of section 15 of the High Court's Charter Act which speaks of settling fees to be allowed to Sheriffs, Attorneys, and all clerks and officers of the Court will not cover this case because, as the the Advocate-General pointed out, section 3 of the Court Fees Act clearly point

1. (1886) I.L.R. 8 All. 282.
2. (1890) I.L.R. 12 All. 129.
3. (1891) I.L.R. 13 All. 66 at p. 73.
4. A.I.R. 1930 Cal. 787, 793.
5. (1919) L.R. 46 I.A. 24: (1919) 36 M.L.J. 437.
6. (1909) I.L.R. 32 Mad. 305, 310: (1909) 19 M.L.J. 340.
7. (1922) I.L.R. 45 Mad. 849, 852 : (1922) 43 M.L.J. 436.

to the fee which is to be taken by the officer as a perquisite, as until recent years we all know they were. Therefore the fee payable for the time being to all clerks and officers of the High Court under section 3 of the Court Fees Act cannot be covered by those words of the High Court's Charter Act. It has always been maintained that the power under which fees are levied on the Original Side of the High Court was derived from the general powers to issue general rules for regulating the practice and procedure of the Courts. It is argued, and I think it is rightly argued. *That the power to make Regulations for procedure necessarily includes imposition of fees and the collection of them, and the Court can collect the fees only through its proper officers.*"

The lines emphasised by us clearly show that the imposition on suitors on the Original Side of the High Court is fees under the power to make regulations for procedure. This view was affirmed by the Division Bench of this Court. Subba Rao, J. (as he then was) sitting with Ramaswami, J., in *Seshadri* v. *Province of Madras*[1], already cited. The learned Judges therein remarked (at page 209) :

" The power of the High Court to prescribe Court-fees in regard to proceedings in the High Court was subject to judicial scrutiny prior to the coming into force of the Constitution of India."

We may also refer to the observations of Wallace, J., in *Lakshmi Ammal*, In re[2] (Devadoss and Wallace, JJ.) (at page 614) :

" The scheme of section 12 of the Court Fees Act is to see that the revenue is not defrauded, that the proper fee payable to Government as the ' price ' of the trial of the suit has been paid."

In *Pethu* v. *Chidambara*[3], Jackson, J., remarked:

"........and it must be remembered that some one has to pay for the up-keep of the judiciary. If the litigant is relieved, the burden is merely shifted to the general tax-payer."

In *G. T. Williams*, In re,[4] Greaves, J., remarked (at page 117) :

" The sum charged upon a grant of Probate or of Letters of Administration is not a tax or duty levied upon the property upon which the probate or administration operates, and it is not charged thereon as is Estate Duty in England, but it is merely a fee levied by the Court issuing the Probate or Letters of Administration for the work done in this connection. And I do not think that this is any less the case because the fee is levied upon the value of the property."

As one of the cases before us relates to Court-fees claimed in a Probate action on caveat being entered, we may refer also to the observations of Viscount Haldane in *Attorney-General for Manitoba* v. *Attorney-General for Canada*[5], the question again arising under the British North America Act as to whether a particular levy was a direct tax or an indirect tax. It is stated (at page 567):

" A probate duty (as distinguished from such a succession duty), paid as the price of services to be rendered by the Government and imposed on the person claiming probate, might, it was indicated, on the other hand, well be direct taxation."

No doubt, Wanchoo, C.J. (as he then was) in *M. S. U. Mills, Ltd.* v. *State of Rajasthan*[6], has remarked that the Court-Fees Act, generally speaking, is a measure for raising revenue for the State. The relevant portion of the judgment is (at page 180):

" So far as fees are concerned, they have to be divided into two parts. There are some fees which are really taxes though they are called fees. In their case, all the incidents of a tax apply, and the limitations to which fees are subject do

1. I.L.R. (1954) Mad. 543: (1954) 1 M.L.J. 206.
2. (1925) 49 M.L.J. 608.
3. A.I.R. 1931 Mad. 533.
4. A.I.R. 1924 Cal. 115.
5. L.R. (1925) A.C. 561.
6. A.I.R. 1954 Raj. 178.

not apply. As an example of this kind, we may mention Court-fees under the Court Fees Act. Though it may be said that Court-fees are charged from parties who come to Court it is still true that the Court Fees Act, generally speaking, is a measure for raising revenue for the State. Then there are fees strictly so called, which are not meant for raising revenue, but for meeting the expenses of the departments of the Government created for regulating professions, trades, callings and employments from which licence fees are levied."

The question in that case was the validity of a licence fee levied by the Rajasthan State under the Factories Act, whether it was fees strictly so called and had the authority of law, or it was a tax. Under the rules framed under the Factories Act certain fees were charged on factories according to the horse-power installed and the number of persons employed in the factory during the year on a sliding scale. Pointing out the distinction between a fee and tax, that a fee levied is not meant to augment the general revenue of the State and that it is fixed generally at such a level as to meet the expenses of the services rendered by the State in connection with matters for which the fee is levied, the learned Judges observe that the distinction between fee and tax is not always kept in mind rigorously in legislative enactments and that many a time what is called a fee is really a tax meant for raising revenues. It is also observed that, constitutionally speaking, a fee is also a tax for the purposes of Article 265 of the Constitution, for no fee can be levied without the authority of law. It is in the context of giving examples that Court-fee was referred to as a tax. The matter was not in actual controversy before the Court in that case.

Examining the history of the levy in the Fifth Report (1812) on East India Affairs, Volume I, at page 63, to which our attention has been drawn by the learned Advocate-General for the State and Counsel for the suitors, is seen the following:

" The *chouthay* or fourth part of the value of property recovered in a Court of Judicature, seems to be considered in most parts of the Indian peninsula, as the compensation or fee due to the ruling power, for the administration of justice. The early abolition of this exaction, on the accession of the British power to the Government of Bengal, and in lieu of it, the introduction of a small percentage on the institution of the suit, has been noticed. This institution fee, under subsequent modification, continued to be received until the establishment of the Courts of dewany adawlut and Courts of Appeal, in 1793, under the new system; when with a view of affording the readiest possible means of relief to such as should be compelled to have recourse to judicial process, it was provided, that no expense whatever beyond the fee of the pleaders, whom the parties might choose to entertain, and the actual charge of summoning their own witnesses, should be incurred in the prosecution of any civil suit, or in the appeal. But this indulgence, arising from motives of humanity, misapplied to a community peculiarly disposed to litigation, was soon found to be productive of such an inundation of suits, as was likely, by overwhelming the provincial adawluts with business, to put a stop to the course of justice altogether; and the Government was obliged to have recourse again, in 1795, to an institution fee, as well as to fees on exhibits, established at rates, such as might render law more expensive, without discouraging recourse to it, where the cause of action might be well founded."

The Bengal Regulation XXXVIII of 1795 contained the following Preamble:

" No expense attending the institution of suits in the first instance; and the ultimate expense, being moderate and limited, whatever length of time the suit may be depending; and no fees whatever being charged on the exhibits and papers filed in the Courts, nor on petitions presented to the Courts not immediately forming part of the proceedings in any suit under trial, many groundless and litigious suits and complaints have been instituted against individuals, and the trials of others have been protracted, by the filing of superfluous exhibits, or summoning witnesses whose testimony was not necessary to the development of the merits of the case. The business in many of the Courts of Judicature, has in

consequence increased so as to prevent the Judges determining the causes and complaints filed, with that expedition which is essential for deterring individuals from instituting vexatious claims, or refusing to satisfy just demands,and for giving full effect to the principles of the Regulation. The establishing of fees on the institution and trial of suits, and on petitions presented to the Courts, being considered to be the best mode of putting a stop to this abuse of the ready means now afforded to individuals of availing themselves of the exercise of the laws, without obstructing the bringing forward of just claims; the following rules have been enacted."

There was a graduated levy tapering as the claim went up in suits for money and for the value of personal property. By Bengal Regulation VI of 1797 new fees were levied, abolishing certain taxes which, it was found inconvenient to realise, and in the preamble of this Regulation one finds the object of the levy is also to add to the public revenues. The relevant part of the preamble runs thus:

"The Vice-President in Council has therefore resolves to abolish this tax; and with a view further to discourage the preferring of litigious complaints, and the filing of superfluous exhibits and the summoning of unnecessary witnesses on the trial of suits, and also to provide for the deficiency which will be occasioned in the public revenue by the abolition of the police tax, as well as to add eventually to the public resources, without burdening individuals, he has resolved to substitute new fees on the institution and trial of suits in the room of the fees established by Regulation XXXVIII, 1795......................"

Bombay Regulation VIII of 1802, clause I, ran as follows :

"Five per cent. commission has been levied on the institution of suits in the Civil Court of Surat since the 8th of June, 1800; but no fees whatever being charged on the exhibits and papers filed in the Court, nor on petitions presented to the Court, not immediately forming part of the proceedings in any suit under trial, groundless and litigious suits and complaints are liable to be instituted against individuals, and the trials of others have been protracted by the filing of superfluous exhibits, or the summoning of witnesses whose testimony was not necessary to the development of the merits of the case. The business has, in consequence, increased, so as to prevent the Judge determining the causes and complaints filed, with that expedition which is essential for deterring individuals from instituting vexatious claims, or refusing to satisfy just demands, and for giving full effect to the principles of the Regulations. The establishing of fees on the institution and trial of suits, and on petitions presented to the Courts being considered to be the best mode of putting a stop to this abuse of the ready means now afforded to individuals of availing themselves of the exercise of the laws, without obstructing the bringing forward of just claims, the following rules have been enacted."

While on this aspect of the matter, it is interesting to refer to a return of salaries and fees drawn in the Supreme Court from the Master downwards, inclusive of Interpreters and the Official Assisgnee in 1858 found at page 22 in the Letters of Strange, J. of the Sudr Udalut, to the Government of Fort St. George on Judicial Reforms (1860). The total salaries drawn for the year 1858 was Rs. 48,475-5-8. The fee realised by them was Rs. 84,929-0-9. The salary of the Chief Justice was Rs. 60,000 and of the puisne Judge Rs. 50,000, the total expenditure of the Supreme Court amounting to Rs. 1,58,475-5-8. It is stated in the report that the charge for salaries fell upon the Government, and the fees were paid by the suitors who were otherwise largely taxed. It would be apparent from the above return that the State was not realising the entire expenditure of the administration of the Supreme Court from the suitors. The Fifth Report looks upon fees as purely regulatory. The preamble to the Bengal Regulation VI of 1797, where Court-fees are contemplated for adding to the public resources, must be read in the context of the times. The phrase therein 'without burdening individuals' is significant. The preamble is apologetic considering the grandiose manner in which earlier even a small per-

centage as institution fee was abolished and the suitor had to pay only his pleaders and the cost of summoning his witnesses.

In the Statement of Objects and Reasons to the Court Fees Act (VII of 1870), the following is found:

> "The rates of Stamp fees leviable in Courts and offices established beyond the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Fort William, Madras and Bombay, and in proceedings on the appellate side of such High Courts, were, as fixed by Act XXVI of 1867, to a great extent tentative.
>
> The experience gained of their working during the two years in which they have been in force, seems to be conclusive as to their repressive effect on the general litigation of the country.
>
> It is, therefore, thought expedient to make a general reduction in the rates now chargeable on the institution of civil suits, and to revert to the principle of maximum fee which obtained under the former law.
>
> As some measures of compensation for the loss of revenue which is expected to result from the general reduction of fees, it is proposed to discontinue the refund of any portion of the amount levied on the first institution of suits and also to raise the fees heretofore chargeable on Probates and Letters of Administration granted under the Indian Succession Act, and on certificate issued under Act XXVII of 1860 to the *ad valorem* rates leviable under the English Law in like cases.
>
> The abolition of refunds is justified by the consideration that for all practical purposes in the majority of cases, the plaintiff, whose suit has not gone beyond the stage at which under the present law he is entitled to recover a moiety of the institution fee, has gained as much through the Court's agency as the suitor whose case has proceeded to a decision, and that, therefore, on the principle on which all Court-fees are adjusted, the former should contribute in equal proportion with the latter to the maintenance of the Courts from whose action both derive an equal benefit.
>
> Lastly, that for the future there may be no confusion between stamp revenue proper and the revenue derived from what have heretofore been termed 'judicial stamps' the proceeds of the proposed enactment are to be designated Court fees."

Clearly, the object and reason for the levy of Court-fees herein stated appear to be the maintenance of the Courts from whose action the suitors derive benefit. This Act of 1870 with certain amendments introduced in this State in 1922 was in force here till it was repealed by the Madras Court-fees and Suits Valuation Act of 1955. The necessity for the passing of the Madras Amendment Act (V of 1922) to the Court Fees Act, 1870, is stated thus in the Statement of Objects and Reasons published in the *Fort St. George Gazette* (Part IV), on the 7th February, 1922:

> "To meet the increased cost of administration it had become necessary to provide additional revenue. The scale of Court-fees for this Presidency was fixed in 1870 by the Court Fees Act, and experience had shown that in regard to various classes of documents to which it refers, the amount payable as Court-fee is not commensurate with their character and importance."

It looks to us in the context, that the cost of administration referred to, relates to the cost of administration of justice. The *ad valorem* fee though increased was as before graded and tapering as the claim increased. The Court-fee payable on a claim for Rs. 50,000 as already referred to, was Rs. 1,762-7-0. There was no maximum as in the Act of 1870, and when the amount for value of the subject-matter exceeded Rs. 50,000, for every Rs. 5,000 or part thereof in excess of Rs. 50,000, a Court-fee of Rs. 30 was payable.

The Statement of Objects and Reasons for the latest Court Fees Act, which has ultimately been adopted for proceedings in the Original Jurisdiction of the High

Court, published in the *Fort St. George Gazette*, Extraordinary, dated 10th May, 1954, ran thus :

> "The Court Fees Act, 1870 was enacted more than eighty years ago. Conditions have materially changed since then and litigation has grown enormously in variety and complexity. The application of the old rules to altered facts and the extension of the rules to cover new cases have resulted in a jumble of statutory and case-law which, at many points, is indefeasible on principle and is a source of all-round inconvenience. The Suits Valuation Act, 1887 (Central Act VII of 1887) makes its own contribution to the incongruities with which this branch of the law abounds. Rationalisation of the law relating to Court-fees and suits valuation has, for the last twenty years, been regarded as an urgent measure of judicial reform. This Bill seeks to achieve that object."

The new Court Fees Act provides for a uniform *ad valorem* fee at 7½ per cent. without limit. Rationalisation is its basis and lowers the Court-fee payable in causes whose value is below Rs. 5,000.

The history of levy of fees in Courts does not decisively make out, that all through Court-fees were levied to raise the general revenues of the State. In fact originally there was no institution fee at all, and Court-fees were later levied with a view to prevent institution of frivolous suits. It was regulatory in its origin, and this attempt to stifle suitors at the threshold evoked caustic comments from Lord Macaulay in his minutes. Even assuming that there are observations in the preamble to some of the regulations that they were intended to increase the public revenues, we have no figures whether the revenues from Courts were intended to meet the general expenditure of the State or just to cover the cost of administration of the judicial department. The report of Sir Thomas Strange shows that the State had been meeting salaries of the Judges. The Statement of Objects and Reasons for the Madras Amendment of 1922 refers only to the need for further finance for the cost of administration, and the object of the current Court Fees Act is to rationalise the imposition of Court-fees. Mahmood, J., no doubt remarked that the preamble had been deliberately omitted in the 1870 Act to cover the fact that the State was taxing the people. But then, whether it was a fee or tax, the levy could not be questioned in a Court of law. Unless there is something else sufficiently weighty to take the view that fees taken in Court's are not fees for services, but are intended to add to the general revenues of the State, regardless of the limited requirements for the administration of justice, neither the legislative history of the levy nor the judicial pronouncements as to the character of the levy compel us to hol d that fees levied in Courts are taxation and their resonableness is not open to scrutiny; and nothing else is manifest.

We are on the interpretation of the Constitution, and trying to find out the content and extent of the power under a legislative head. The Supreme Court in a catena of decisions has held that the Constitution draws a distinction between 'fees' and 'taxes'. The argument that 'fees' and 'taxes' are found indiscriminately used in some statutes cannot apply, when we are examining the Constitution to find out what legislative powers have been conferred under a particular Entry under the Provincial List. Where words though analogous having distinct and separate meanings, 'fees' and 'taxes' are found used, in the same part of the Constitution, and the content of the expression 'fees' in the three Legislative Lists, Entries 96, 66 and 47 have been analysed and determined, the expression 'fees' in Entry 3 of List II should normally be held to have the same content. When there are two expressions, and one of them covers only a segment of the former, and both the expressions are found in the same Part of the Constitution, we cannot readily assume that analogous words have been used and the contents are the same. In *Wallace* v. *Commissioner of Income-tax*[1], the Privy Council observed :

1. L.R. 75 I.A. 86: (1948) 2 M.L.J. 62: (1948) F.L.J. 32: (1948) F.C.R. 1.

"Where Parliament has conferred a power to legislate on a particular topic, it is permissible and important in determining the scope and meaning of the power to have regard to what is ordinarily treated as embraced within that topic in legislative practice of the United Kingdom."

The learned Advocate-General referred us to Holdsworth's History of English law, but we find nothing in it to warrant an expansion of the ambit of the expression 'fees.' It is seen in Holdsworth that, in fact, fees were collected only for services and, from the first Judges were paid salaries by the Crown, though, no doubt salaries of the Judges had not in the earlier centuries formed their only source of income, and they appear to have drawn a considerable part of their income from fees. But the officials of the Courts of common law were paid almost entirely by fees. "In fact, it would be true to say that the official staff of all the central Courts (except the Lord Chancellor and the Judges) was almost entirely self-supporting.". (*Vide*-Holdsworth's History of English law, Vol. 1, Seventh Edition, page 255). The principle accepted in England in the matter of levy of Court-fees appears to be that the salaries and pensions of Judges should be paid by the State out of public funds, it being accepted that it is the obligation of the State to provide the machinery for the dispensation of justice in all its Courts—civil, criminal and revenue—and that only the other expenses of the administration of justice should be borne by the litigants. In the Second Interim Report of the Committee of Supreme Court Practice and Procedure (England) at page 43 is found the following quotation from Mr. Justice Macnaughten :

"The Supreme Court is not merely engaged in the work of dispensing justice to the private suitors who resort there; it administers public justice not only in criminal cases, but also in civil matters, such as proceedings on the Crown side of the King's Bench. For the cost of administration of justice where the public itself is directly concerned, the State ought to, it is suggested, provide the necessary funds since there can be no reason why the private suitors should do so. Though it would, no doubt, be difficult to calculate exactly how much of the expenditure of the Supreme Court is attributable to the administration of public, as distinguished from private justice, the salaries and pensions paid to the Judges may perhaps be taken to represent fairly that figure."

In our view, there is another aspect of the matter. The actual suitor, who goes to the Court and avails himself of the machinery of the administration of justice which the State provides in discharge of one of its fundamental functions, is not the only person benefited by this activity of the State. For every cause that comes to the Court, many may not arise at all, the very existence of the Court and the fact that the State through its machinery would enforce rights and obligations recognized by law deter many a would-be defaulter from carrying out his obligations. The existence of rights declared, recognized or given by laws, will be of little avail if there is no machinery for securing them when denied. Laws are automatically adhered to and obligations duly discharged by a person not necessarily and always from a recognition of a sense of duty, but because of the existence of a machinery for enforcement and the consequences that might follow, if the aggrieved party seeks his remedy through Court. A suitor who goes to Court and seeks a special benefit, may be liable for a fee, but whether there are enough cases are not, some Courts at least would have to be maintained, and when the suitors are few it would be taxing them if they are called upon to bear the entire cost of the administration of justice in all its branches without any reference whatsoever to the services rendered to the few that are driven to the Courts to seek justice. In such a case suitors are called upon to meet also cost of the general expenses of a department of the Government without any correlation, to the services rendered. Viewed in this light, and having regard to the practice in England, the power to which the levy of fees in the High Courts is traced assumes some significance. Sections 106 (1) and 107 of the Government of India Act of 1915 have to be referred to here :

"*Section* 106 (1): The several High Courts are Courts of record and have such jurisdiction............and all such powers.............and power to make rules for regulating the practice of the Court, as are vested in them by letters patent, and, subject to the provisions of any such letters patent, all such jurisdiction, powers and authority as are vested in those Courts respectively at the commencement of this Act."

"*Section* 107 : Each of the High Courts has superintendence over all Courts for the time being subject to its appellate jurisdiction, and may do any of the following things—

* * * * *

(*e*) settle tables of fees to be allowed to the Sheriff, Attorneys, and all clerks and officers of Courts."

As pointed out in *Seshadri* v. *Province of Madras*[1] :

"A combined reading of these provisions (the above along with section 15 of the Charter Act, and Article 37 of the amended Letters Patent of the High Court) enable the High Courts to make rules for regulating the practice of the Court and also to fix Court-fees in respect of proceedings in the High Court. It is true, as contended by the plaintiff, the terminology used in section 107 (*e*) is not appropriate to the power to impose Court-fees, alleged to be conferred on the High Court. But the words have a historic origin. Originally the officers were paid from the fees collected and though that practice was given up, the same words, were continued to be used. These words, obtained as it were, a secondary meaning and it is neither possible nor permissible to give a different meaning to those words at this stage. Indeed the Court Fees Act passed by the Central Legislature uses similar words in section 3 of the Act to indicate Court-fees."

For a proper approach to a matter of this kind, to ascertain the real character of the levy, we get guidance from the observations of Gajendragadkar, J. (as he then was), in *Hingir Rampur Coal Co.* v. *State of Orissa*[2], already cited:

"In such a case it is necessary to enquire what is the primary object of the levy and the essential purpose which it is intended to achieve. Its primary object and the essential purpose must be distinguished from its ultimate or incidental results or consequences. That is the true test in determining the character of the levy."

Referring to the circumstances under which the Court Fees Act (VII of 1870), which provided the pattern for levy of Court-fees till the passing of the Court Fees Act of 1955 in our State, came to be passed, the Report (1939) on the revision of the Court Fees Act, which formed the basis for the now impugned Act, says (at page 3) :

"Lord Lawrence considered that the greatest evil in the administration of justice arose from the under-payment to the mufassal Judges and Officers of their Courts. Plans were considered to remedy this evil and the main reason for the Stamp Bill of 1867 was a proposal by Mr. Strachey that a certain sum of money should be expended in enhancing the salaries of ministerial officers and judicial officers. This proposal involved extra expenditure of several lakhs and the finances of the country could then ill-afford to bear the additional burden. To find ways and means, a Commission was appointed with the object to derive, if possible, out of the Stamp duties levied in judicial proceedings, sufficient revenue to meet the increased expenditure to be incurred by the Courts and made the Courts self-supporting. On the recommendations of the Stamp Commission Act (XXVII of 1867), was passed, which was then superseded by the present Court Fees Act (VII of 1870)."

1. I.L.R. (1954) Mad. 643: (1954) 1 M.L.J. 206-209.

2. (1961) 2 S.C.R. 537: A.I.R. 1961 S.C. 459-466.

No objection has been taken before us to the reference of the report, evidently because as pointed out by Lord Atkin in *Ladore* v. *Bennet*[1], it is not cited as evidence of the facts therein found but as indicating the materials which the Government of the Province had before them before promoting in the Legislature the statute now impugned.

In *M. S. U. Mills Ltd.* v. *State of Rajasthan*[2], already cited, where there is a passing observation that Court-fees are really taxes, as an illustration of fees, which are taxes, the test for a levy to be a fee is thus stated:

> "If a levy is a fee strictly so called, it is subject to the limitations, which we have mentioned above, namely, that it should not be levied for purposes of augmenting general revenues, and should be for some service rendered by the State and should be preceded by permission sought by the subject."

In the light of the history of the levy and the legislative practice with regard to the same, and in the absence of any data, or figures that in the past Court-fees were regarded as a source of general revenues of the State and were levied with a view to raise more than necessary funds for the expenditure incurred in the administration of justice to be available for the general purposes of the State, the first test, we would say, of Wanchoo, C.J., (as he then was) is satisfied. There can be no doubt that the second and third are satisfied. A suitor approaches the Court for services, and no payment is called for where there is no request for service. It is not levied and exacted from a citizen who has nothing to do with the Courts, but it is the suitor who seeks some relief in Court that is called upon to pay it.

There are two decisions, since the Constitution, which take the view that the fee levied in Courts differs from the type of the fee found in Entry 66 of List II. In *Khacheru Singh* v. *S. D. O. Khurja*[3], the validity of the levy of a Court-fee of Rs. 50 on petitions under Article 226 was in challenge before a Full Bench. It was contended for the suitor that a fee taken in Court within the meaning of Entry 3 must be a levy which has the essential characteristic of a fee, that is to say, it must be a payment for services rendered which are reasonably related to the expenses incurred in providing that service. It was argued that while there was *quid pro quo*, as the State Government was also making a very large profit out of Court-fees, the Court-Fees Amendment Act of 1959 of the Uttar Pradesh increasing the Court-fee was *ultra vires*. It was contended for the State that the fees with regard to which the State Government had the power to legislate under Entry 3 were taxes and no question of *quid pro quo* therefore arose. The learned Judges held that the fee levied in Courts was neither a tax nor a fee, as these terms had been defined by the Supreme Court in *Commissioner, Hindu Religious Endowments* v. *Lakshmindra Thirtha Swamiar*[4], *Ratilal* v. *State of Bombay*[5], and *Jagannath* v. *State of Orissa*[6]. According to the learned Judges as it was not an exaction imposed without reference to any special benefit conferred on the payers, but being imposed only on those persons who wished to file documents in a Court, it could not properly be called a tax, and the learned Judges would hold that it was not a fee as so defined if only for the reason that the moneys realised have not been set apart, but have merged in the public revenue of the State. Emphasis is laid on Article 229 (3) of the Constitution whereby fees taken in the High Court formed part of the Consolidated Fund of the State. Observing that it was not possible for fees taken in Courts to be credited to a separate fund in view of the constitutional provision in that regard, the learned Judges took the view that the fee taken in Courts under Entry 3 of List II should not be interpreted to refer to such fees which must be credited to a separate fund and not to the general fund of India or the State. They are of the view that it is an essential characteristic of the fee considered by the Supreme Court in the cases mentioned above that it shall be set apart and not merged in the general revenue of the State. Therefore, in their view there exists another class of

1. L.R. (1939) A.C. 468, 477.
2. A.I.R. 1954 Raj. 178, 181.
3. A.I.R. 1960 All. 462 (F.B.).
4. (1954) S.C.J. 335 : (1954) 1 M.L.J. 596 : (1954) S.C.R. 1005 : A.I.R. 1954 S.C. 282.
5. (1954) S.C.J. 480 : (1954) 1 M.L.J. 718 : (1954) S.C.R. 1055 : A.I.R. 1954 S.C. 388.
6. (1954) S.C.J. 329 : (1954) 1 M.L.J. 591 : (1954) S.C.R. 1046 : A.I.R. 1954 S.C. 400.

imposition also called a fee in the Constitution which differs from the type of fee falling under Entry 66 of List II. One of the learned Judges (Dayal, J.) observed (at page 466):

"There can be no doubt that Court-fee is charged for services rendered. It is the litigant who goes to Court for getting help in enforcing his rights. The Court renders him service by giving him redress when he succeeds in establishing the wrong done to him. There can be no monetary measure of the service rendered. The first element essential to make a payment a fee is present. The second element of the fee not going to a separate fund does not exist in the case of Court-fee collected by the State."

The Allahabad High Court thus appears to be of the view that the fee taken in a Court is a fee *sui generis*, and though a fee, its application cannot be scrutinised and correlation examined. No doubt, Dayal, J., observes:

"It follows therefore that the Constitution did not contemplate it to be an essential element of a fee that it be credited to a separate fund and not to the Consolidated Fund."

The argument before us is that, once the power that is granted is the power to levy a fee, there is a limitation in the power, and that the levy must satisfy the essential requisites of a fee, and there must be reasonable correlation of the services rendered. We find no specific discussion on this aspect of the matter in the judgment under consideration. The question now mooted is whether under this power of legislation revenues could be raised for public purposes, the general expenses of the State, not solely for purposes of the administration of justice.

Similar is the view taken by the Bombay High Court in *C. P. Syndicate (Private) Ltd.* v. *Income-tax Commissioners*[1], where the validity of the levy of Court-fee under the new Bombay Court Fees Act of 1959 on a group of income tax applications come up for consideration. The learned Judges referred to the decision of the Judicial Committee in *Rachappa Subrao* v. *Shidappa*[2] and observed that the Court Fees Act was in essence a taxing statute and that the fees collected under the Act were for the purposes of raising the general public revenue, had been the view expressed about the enactments in several judicial decisions. We have discussed the judicial decisions on the matter that have been brought to our notice, and also examined the legislative history of the levy, and with respect we would differ and hold that Court-fees were not levied to raise funds for the general purposes of the State. We agree with our learned brother, Srinivasan, J., in his referring order that Court-fees are not instruments through which the general public revenues of the State are intended to be raised. The learned Judges of the Bombay High Court, as in Allahabad, referring to Article 229, observed (at page 114):

"It is therefore clear that one of the essential elements laid down by the Supreme Court as the requisite of a fee, namely, that it must be appropriated to a separate fund earmarked to meet the expenses of the services, had never been true of the Court-fees at any time and is also not true of the Court-fees levied after the Constitution. We agree, therefore, with the learned Advocate-General that the Court-fee does not fall in the category of fees with which their Lordships of the Supreme Court were dealing........The learned Advocate-General, in our opinion, is right in saying that the levy of Court-fee for raising the general revenue has been authorised by the relevant Entries in the Legislative Lists under the Constitution, and the challenge therefore to the validity of such fees on the ground that they are not earmarked as a separate fund for the purposes of meeting the expenses of the services rendered cannot be sustained."

The question in the form now before us was mooted in the Andhra Pradesh High Court in *Satyanarayanamurti* v. *Income-tax Appellate Tribunal*[3], but no definite views were expressed as there were no details to sustain the arguments. Subba Rao, C.J., (as he then was of that Court) observed:

1. A.I.R. 1962 Bom. 106.
2. L.R. (1919) 46 I.A. 24: (1919) 36 M.L.J. 437.
3. (1957) 1 An.W.R. 360: A.I.R. 1957 A.P. 123-127.

"The learned Counsel then raised an important question which if accepted, would invalidate the Act. He says that the Act, under the cloak of collecting fees, provides for taxation and, therefore, is void. Reliance is placed upon the obvious difference between a fee and a tax and the contention is advanced that fees payable on an application under Article 226 of the Constitution is unreasonable and not commensurate with the services rendered by the State, and, therefore, the enhancement of the rate of Court-fee is void. It is not possible to consider this question, in this case for it should be necessary to ascertain whether the Court-fee levied is far in excess of the expenses incurred by the State of Judicial Administration. The petitioner has not filed any affidavit giving details to sustain his arguments. We would prefer not to express our view on this important question in this case."

Having given our careful and, indeed, anxious consideration to the arguments of the learned Advocate-General for the State, we are unable to agree with the contention that fees taken in Courts are a category by themselves, and need not contain even the essential elements of the expression 'fees' laid down by the judicial decisions and recognised in legislative practice. To accede to the argument would, in our view, be too readily assuming that the Constitution-makers were using the same expression in different senses in the same Entries—Entry 86 of List I, Entry 66 of List II, and Entry 47 of List III—and in Entries in the same list. There is nothing compelling us to presume that the word 'fees' in Entries 96 of List I, 66 of List II, and 47 of List III, the phrase 'fees taken in any Court' bears a different meaning from the same word in the beginning of the Entries, particularly when there is apparent a substantial and solid reason for placing 'fees taken in any Court' under a separate head. We are conscious that the provisions of the Constitution should not be cut down by any narrow technical construction and that a large and liberal interpretation should be given to the legislative Entries. But here we have to determine the limits of the power under different heads. We are not prepared to hold that the founding fathers of our Constitution lightly used a word which has a special significance in the context of legislative power when they used it to define a legislative power and did not intend the expression to have its accredited significance but empowerd the States to tax suitors for the general purpose of the State. The suitor approaches the Court for justice and enforcement of the laws the Governments have made. Declaration of rights and enactment of laws are of little avail unless there is remedy available for the citizen to have the benefit of the same.

"The substantial law which defines our rights and duties is, of course, important to all of us, but unless the adjective law of procedure is a working machine constantly translating these obligations in terms of Court orders and actual execution, the substantive law might just as well not exist." (Quoted by Paton in his text-book of Jurisprudence, Third Edition, at page 538).

In *Balkaran Rai's case*[1], Mahmood, J., remarked on the absence of a preamble to the Court Fees Act and doubted whether it was intended to regulate questions of procedure or to regulate the method of the collection of revenue, that is to say fiscal questions for the purposes of the obtainment of money from the tax-payer in order to achieve such results as the State had in view to carry on the administration of the country ; and in *Radha Bai's case*[2], he attributed the absence of a preamble in the Court Fees Act to the anxiety of the Legislature not to explain the reason for the enactment as the reason could be nothing other than that they were taxing the Indian population. In his scathing criticism of the Court Fees Act, referring to the absence of the preamble, he remarked that "sometimes silence is golden". But here we have the Constitution which speaks of the levy in Courts as 'fees', an expression that does not smack of any oppressive exaction. Why should we in the context equate the expression more or less to a tax and that is what it comes to, when all that

1. (1890) I.L.R. 12 All. 129-164. 2. (1891) I.L.R. 13 All. 66-73.

is recognised for the levy is the occasion of the levy and not its correlation to the services required.

It remains to consider whether the impugned levy is not justified as a fee properly so called. Fees as already stated may be of various kinds, and there can be no general definition applicable to all cases. They may have characteristics according to the need or occasion of the levy. But the essential element is that it is a levy in consideration of services performed by the State for the benefit of the individual, who is called upon to make the payment, and it cannot be an exaction that cannot be reasonably correlated to the services. Of course, there is some element of taxation in a fee; there cannot but be. All the same the essential distinction is there, and the question will always be to look for the pith and substance, whether the taxing element predominates. If the element of revenue for the general purposes of the State predominates, then the taxing element takes hold of the levy and it ceases to have any relation to the cost of administration of the laws to which it relates; it becomes a tax. Its validity has then to be determined with reference to its character as a tax and it has to be seen whether the Legislature has the power to impose the particular tax. When a levy is impugned as a colourable exercise of legislative power, the State being charged with raising a tax under the guise of levying a fee, Courts have to scrutinise the scheme of the levy carefully, and determine whether, in fact, there is correlation between the services and the levy, or whether the levy is execessive to such an extent as to be a pretence of a fee and not a fee in reality. If, in substance, the levy is not to raise revenues also for the general purposes of the State, the mere absence of uniformity or the fact that it has no direct relation to the actual services rendered by the authority to each individual who obtains the benefit of the service, or that some of the contributories do not obtain the same degree of service as others may, will not change the essential character of the levy. Nor can the feature that it is not separately funded be decisive in the matter. However, when not funded, reasonable correlation must be established, and it must be shown that the receipts are meant for the services. When a levy is challenged as unreasonable and beyond the legislative power which authorised only a fee, the decision will have ultimately to depend upon the particular facts of the case. Certain general tests have been formulated to decide whether a fee is reasonable in the circumstances and does not exceed the bounds of a fee. In *Hingir Rampur Coal Co.* v. *State of Orissa*[1], referred to *supra* it is said at page 468:

"The extent of the levy authorised would always depend upon the nature of the services intended to be rendered and the financial obligations incurred thereby. If the services intended to be rendered to the notified mineral areas require that a fairly large cess should be collected and co-relation can be definitely established between the proposed services and the impost levied, then it would be unreasonable to suggest that because the rate of the levy is high it is not a fee but a duty of excise.......... It is significant that the petitioners do not seriously suggest that the services intended to be rendered are a cloak and not genuine or that the taxes levied have no relation to the said services, or that they are unreasonable and excessive. Therefore, in our opinion, the extent of the rate allowed to be imposed by section 4 (2) cannot by itself alter the character of the levy from a fee into that of a duty of excise. If the correlation between the levy and the services was not genuine or real, or if the levy was disproportionately higher than the requirements of the services intended to be rendered it would have been another matter."

The question has come up for consideration, as stated earlier in this judgment, when considering the reasonableness of levies by local authorities. In *Corporation of Madras* v. *Spencer & Co.*[2] (Phillips and Reilly, JJ.) the validity of a licence fee imposed by the Corporation of Madras under section 287 of the Madras City Municipal Act of 1919, came for scrutiny. The licence fee for storing foreign liquor was

1. (1961) 2 S.C.R. 537: A.I.R. 1961 S.C. 459.

2. (1929) 57 M.L.J. 71: (1929) I.L.R. 52 Mad, 764.

raised from Rs. 25 to Rs. 200, and it appearing from the evidence that the expenses of supervising the place where foreign liquor was stored was practically nil, this Court held that the levy of the enhanced fee was unreasonable. Reilly, J. observed (at page 775) :

> " If the power to levy these fees cannot be used for taxation, it is admitted that the Council has not the power to fix any arbitrary fee which it chooses...... when such a question comes before a Court, it is not for the Judge to try minutely to assess what is the proper fee ; nor is it for the Judge to substitute his judgment in the matter for that of the public body to which the Legislature has entrusted it. But I think there are two principles which we may use to determine whether the fees fixed by a Municipal Corporation with powers such as these can be held to be reasonable or not. If we accept the proposition that the power of charging licence fees cannot be used for taxation, then we must say that as a whole the fees charged by the Corporation must not be very much in excess of what the duties cast upon them and their staff in connection with the licences cost them. There is the cost of issuing the licences ; there is the cost of inspecting the premises to see whether they are suitable for the purpose proposed ; and there is the subsequent cost of inspecting the premises to see that they are being used properly and that the conditions and restrictions imposed by the Commissioner are observed. But, roughly speaking, if the fees are charged at so high a rate that as a whole they bring in very much more than the cost of these operations to the Corporation, then I think we can rightly say that they are unreasonable. There is another princlple. Although it is almost impossible for the Corporation itself to ascertain, when they are issuing a number of licences to persons engaged in different trades and occupations, exactly what is the cost of any particular licence or of licences for persons engaged in particular trades or occupations—and certainly we could not attempt anything of that sort—yet, surely it would be unreasonable if they so fixed the fees that the whole cost incurred by them in connection with all the licences or a grossly disproportionate part of it was imposed on one particular trade or a few particular trades. These principles, I think, may be of help in ascertaining whether a particular fee is reasonable or not."

There need be no exact correlation ; in some cases it may be a practical impossibility. But the levy should not be so distributed that it is grossly disproportionate to the services, or requirements. This Court again examined the reasonableness of a levy under the Madras District Municipalities Act in *India Sugars and Refineries Ltd.* v. *Municipal Council, Hospet*[1]. While upholding the validity of the levy, the approach to the question of reasonableness was thus set out :

> " It is, we think, well settled that a licence fee for carrying on a particular trade or industry should not be regarded as a form of taxation the extent of which is to be governed purely by revenue considerations. The licence fee should bear as nearly as possible a relation to the cost of issuing the licence and the cost of supervising the trade or of any special measures rendered necessary by the character of that trade. We doubt whether the Municipality would be justified in increasing the licence fee chargeable upon a particular industry merely by reason of the cost of ordinary municipal services to which that industry is entitled by virtue of its position as a taxpayer in the municipality. But if the industry involves special sanitary precautions, a special supervising agency or such like expenditure, it is, we think, reasonable to take this expenditure into account in fixing the amount of the fee. When a supervising agency is necessary for a number of industries, it will always be difficult to say how the cost is to be apportioned and, so long as the apportionment is made on a reasonable basis, it is not for the Courts to interfere with the way in which it has been achieved........ The Courts certainly should not declare a fee or a levy to be *ultra vires* merely because it is somewhat higher than might have been thought necessary on a different view of the facts."

1. (1942) 2 M.L.J. 663 : I.L.R. (1943) Mad. 521, 526.

These principles were again reiterated by this Court in *Varadachari* v. *State of Madras*[1], where this Court struck down as unconstitutional the enhancement of a licence fee from a flat rate of Rs. 10 to Rs. 100 per expeller in an oil mill under the Madras Manure Dealers Licensing Order, 1949. This Court examined the materials placed on record to see if there was any justification for the sudden enhancement of the licence fee from Rs. 10 to Rs. 100 per expeller. Finding that the amount collected was disproportionately high in comparison with the expenditure incurred by the Government, even according to their statement, the fee was struck down.

In *Pazundaung Bazaar Company Ltd.* v. *Municipal Corporation of the City of Rangoon*[2] the Judicial Committee had to consider the licence fee levied by the Corporation of the City of Rangoon, following the expression of the views of the High Court as to the scope of the power in *Muncipal Corporation of Rangoon* v. *Sooratee Bara Bazaar Co., Ltd.*[3]. It is instructive to examine the manner of levy of the fee in that case which was upheld by the Judicial Committee. Under the Municipal Act in question no one shall keep open a private market without a licence from the Corporation for which the Corporation may charge a fee. In fixing the fee, what the Corporation did was to arrive at the total amount of the cost which was to be covered by the sums payable by all the private markets. This total sum they divided among all the private markets, in the ratio their respective assessable value bore to the total assessable value of all the markets. The Judicial Committee felt unable to hold that the licence fees which were charged were not fees validly charged under the powers conferred upon the Corporation by that section.

In *Delhi Cloth and General Mills* v. *Chief Commissioner, Delhi*[4], a Division Bench of the Punjab High Court had to examine the validity of the payment of Rs. 1,25,157-50 as registration fee, the contention being that it was not a fee, but a tax. Under a Notification issued in 1952 under the Registration Act (1908) the basis of the fee for registration of documents was the value or consideration money specified in the document sought to be registered. For documents in which the value or consideration money was above Rs. 1,000 for every one thousand rupees a fee of Rs. 5 was payable in addition to the sum of Rs. 12-8-0 payable on the first one thousand rupees. Calculating in this manner, the amount aforesaid was demanded on a debenture trust deed mortgaging properties for a consideration of Rs. 2.5 crores. After referring to the decisions of the Supreme Court which we have cited above, and examining the scheme of the Registration Act, the learned Judges observed :

"Applying the tests laid down in the decisions cited above to the facts of the present case, we are clearly of the view that the fee in the instant case is not a fee but in its very nature is a tax. The reasons why we hold so are :

(1) That the fee is not deposited in a separate head or account but is merged in the general revenue of the State. It is not solely used for the maintenance of the registration department but goes into a consolidated fund which is utilised for various other governmental functions ;

(2) That there is no reasonable correlation between the fee levied and the cost of maintenance and administration of the registration department. To illustrate, a document running into several pages may be liable to a nominal fee, whereas a document running into a single page may be liable to an exorbitant fee."

We shall now examine, in the light of the above principles, the figures in relation to the impugned levy which have been made available to us. Sri V.K. Thiruvenkatachari, learned Counsel for the suitors, emphasises that this is not a case of a new levy, but a case of enhancement, and that being the case, the first question for consideration is whether at all there has been such an increase of expen-

1. (1952) 2 M.L.J. 410: I.L.R. (1953) Mad. 217.
2. (1931) L.R. 58 I.A. 313 : (1931) 61 M.L.J. 740 : I.L.R. 9 Rang. 440 (P.C.).
3. (1927) I.L.R. 5 Rang. 212.
4. A.I.R. 1964 Punj. 492-496.

diture by the State in the administration of justice as warranted the exorbitant levies that have been imposed. The averment in the affidavit of the suitor in W.P. No. 1743 of 1964 is:

> " There was no justification for the increase of Court-fees in 1955 at all on the basis of civil litigants being made to pay fees covering the expenditure on civil litigation. While a fee which cannot be separately allocated to the service of each item, may be fixed on estimates at the inception, whenever an increase is contemplated, it is for the authority to justify by facts and figures such increase by showing that the actual expenditure at the time exceeds the fee income. The petitioner is advised and states that judged by this test, the increases of 1955, were without any legal or factual justification."

To repeat in this context, it is urged for the suitors that the State is proceeding on the basis that the Court-fees paid by the civil litigant is to compensate the Government both for the cost of civil and criminal administration and that this makes it a tax, as the civil suitor is not bound to bear the cost of the criminal administration. The challenge is to the *ad valorem* fee at the uniform rate of 7½ per cent. without limit even at the higher levels, when the demand is stated to become oppressive and discriminatory. It is urged that the value of the claim is not a reliable criterion of the complexity of the litigation or the judicial time it would take, at any rate they cannot be in direct proportion to the value. Our attention is drawn to the Court-fees levied still in their Original Jurisdiction in the High Courts of Bombay and Calcutta, where the very low court-fee of former days is continued. It is stated that as only suits for large claims can be instituted in the High Court, there cannot be marked difference in the judicial time taken over the suits by reason only of the difference in the value of the claims.

In the counter-affidavit originally filed in the matter by the Joint Secretary to the Government (Sri Kelu Erady) certain figures referred to as the actuals for 1954-55 relating to the revenue from Courts and the cost of administration of justice were furnished. As already pointed out, there was no plea then that what is levied is not a fee. The attempt in the counter-affidavit has been at correlation. It was contended for the Government that the cost of criminal administration and the fees paid to the Government law officers should also be taken into account when examining and correlating the realisations and expenses. Surprisingly, one finds also an averment that the levy has not become a weapon in the hands of the defendant, as the plaintiff can, if his case is true, recover the Court-fees from the defendant along with his claim and that therefore there was no need to fear. This is no answer as it is immaterial whether it is the plaintiff or the defendant that has ultimately to pay. The question is whether the cost of litigation which has necessarily to be incurred when the claims are high, is staggeringly heavy and has a regressive effect warding off from Court even suitors with just claims, at the same time being unrelated to the services rendered to the suitors. If it is an undue exaction the fact that the plaintiff could recover it from the defendant will not validate it. On no principle could the defendant be called upon to meet a demand which is invalid and further it is not always that recovery is possible from the defeated defendant.

Further figures have been placed before us by the Deputy Secretary to Government in the Finance Department (Sri Shivakumar) in a supplemental counter-affidavit. We shall first examine the figures furnished in the affidavit of Sri Kelu Erady, Joint Secretary to Government. The figures are, as already stated, the actuals for the years 1954-55. The Court-fees were increased in the year 1955. The total income from all sources in the matter of administration of justice, deducting refunds, is shown as Rs. 122.12 lakhs. Deduction has to be made from this of Rs. 1.63 lakhs, the cost of stamps and charges for the sale of stamps. The net income would come to Rs. 120-49 lakhs. The income includes fines and forfeitures. The cost of administration of justice is shown as Rs. 124.94 lakhs. It is, therefore, stated that the expenditure on the administration of justice was higher during the year

than the fees realised. Thus correlation has been attempted, and justification pleaded for enhancing the Court-fees in 1955. But the expenditure includes not only expenses of maintaining the criminal Courts, but also the expenditure incurred by the Government on its own Law Officers. The expenditure on Law Officers of the Government like the Advocate-General, the Government Pleaders, Public Prosecutors and their establishments alone comes to Rs. 6.26 lakhs. Leaving out for the moment the expenditure incurred in the administration of criminal justice, deducting only the expenses of the Law Officers of the Government, the expenditure would be Rs. 118.58 lakhs, less than the revenue from all sources. Clearly, these figures do not *per se* justify any need for enhancement to the exhorbitant levies seen in the *ad valorem* scale on the higher claims under the Court-fees Act of 1955.

Sri V. K. Thiruvenkatachari, learned Counsel for the suitors, submits that when the State proceeded to bring in the fresh legislation for the levy of Court-fees, its avowed object was not to enhance the Court-fees having regard to any increased expenditure in the administration of justice, but for rationalisation of the law relating to Court-fees. And as we understand the learned Counsel, the rationalisation has been at the expense of the character of the levy. As we are here not attempting to interpret any provision in the Court-fees Act, but are examining the circumstances under which the enhancement came in the statute book, we may properly and usefully refer to the statement of objects and reasons in introducing the Bill. We have already set it out *supra*. The part relevant in the context is :

> "The Court-fees Act, 1870 was enacted more than eighty years ago. Conditions have materially changed since then and litigation has grown enormously in variety and complexity.... Rationalisation of the law relating to Court-fees and Suits Valuation has, for the last twenty years, been regarded as an urgent measure of judicial reform. This bill seeks to achieve that object."

Clearly, the new Court-fees Act was intended to rationalise the levy and not to enhance the revenue from the levy to meet any increased expenditure in the administration of justice. In the report on the revision of Court-fees Act submitted in 1939 by the Special Officer on the question of levy of Court-fees, which preceded the present Act, there is no whisper about enhancing the levy with a view to meet increased expenditure. As for the propriety of such references, learned Counsel drew our attention to *Letang* v. *Cooper*[1], wherein Lord Denning has stated (at page 933) :

> "It is legitimate to look at the report of such a committee, so as to see what was the mischief at which the Act was directed. You can get the facts and surrounding circumstances from the report, so as to see the background against which the legislation was enacted."

While examining the effect of the legislation, the Court may take into account any public general knowledge of which the Court would take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of the legislation will be—see *Attorney-General for Alberta* v. *Attorney-General for Canada*[2]. Examining the financial implications of certain recommendations made as regards the *ad valorem* levy (reduction from 11¼ per cent. to 7½ per cent. for claims) which do not exceed Rs. 1,000, and a flat rate of 6 per cent. for claims of Rs. 10,000 and above recommending also (a maximum fee of Rs. 10,000) it is found stated in the Report (page 22) :

> "There need be no apprehension that the revenue will be reduced for there are several other recommendations in this report, namely, those regarding the levy of a proper fee in suits relating to immovable property and for the levy of fees in several other proceedings which are now escaping with the payment of a nominal fee and other recommendations which are expected to act as an effective

1. L.R. (1965) 1 Q.B. 232 : (1964) 3 W.L.R. 373 : (1964) 2 All E.R. 929.
2. L.R. (1939) A.C. 117-131.

check on the evasion of the payment of the proper Court-fee. These additional sources of revenue, the enhancement of the fee in proper cases and the stiffening of the provisions of the Act to prevent a leakage of the revenue will, it is hoped, compensate for the loss that would result by effect being given to the above recommendation."

In the Fourteenth Report of the Law Commission of India (Reform of Judicial Administration), Volume I, page 503 is found the following table of revenue from an expenditure on the administration of justice in the State of Madras between 1952 and 1955.

In the State of Madras : Between 1952-55.

Financial year.	*Receipts in Rupees.*	*Charges in Rupees.*	*Surplus.*
1952-53	2,56,38,497	1,78,54,860	77,83,637
1953-54*	69,88,689	53,28,575	6,60,114
1954-55	1,22,12,475	1,20,51,874	1,54,601

*For the second 6 months only, as there was separation of Andhra.

The learned Goverment Pleader also had supplied us with the following table of similar figures of Revenues and Expenditure from the year 1954-55 to 1966-67:

Year.	*Revenue Head IX/XIV Judicial Stamps.*	*Revenue Head Administration of Justice.*	*Total Revenue*	*Major head 27/21 Expenditure on administra- of Justice.*	*Profit (+) or Loss (—)*	
		Rupees in lakhs.				
	Rs.	Rs.	Rs.	Rs.		
1954-55	78.53	43.60	122.13	124.94	(—)	2.1
1955-56	148.75	57.60	206.35	127.23	(+)	79.12
1956-57	124.58	62.05	186.63	125.73	(+)	60.91
1957-58	104.34	67.63	171.97	124.11	(+)	47.86
1958-59	117.12	56.07	173.19	135.58	(+)	37.61
1959-60	116.96	52.39	169.35	138.51	(+)	30.84
1960-61	118.96	60.36	179.32	148.51	(+)	30.81
1961-62	126.39	72.07	198.46	157.90	(+)	40.56
1962-63	132.70	85.32	218.02	162.85	(+)	55.17
1963-64	143.96	87.02	230.98	167.37	(+)	63.61
1964-65	150.40	94.90	245.30	173.27	(+)	72.03
1965-66 (Revised Estimate)	160.27	97.02	257.29	193.48	(+)	63.81
1966-67 (Budget Estimate).	160.27	94.66	254.93**	195.99	(+)	58.94

*This excludes expenditure on maintenance of buildings, construction of new buildings and other works expenditure.

**This does not include the increase on account of enhanced Dearness allowance granted with effect from 1st June, 1966.

The tables show that right through (we have already dealt with the States figures for 1954-55) there has been substantial surplus, and no case could be made out for an increase in the revenues to meet the related administrative expenses.

No serious difficulty has been pleaded before us for analysing the income and expenditure in relation to the judicial wing of the State and giving break-up figures.

for a period of years except that some time would be taken. But the matter has been pending for over two years. Under the learned Advocate-General's directions the further figures referred to above separating the finances on Civil and Criminal Justice have been placed before us during arguments. Serious objections are taken for the suitors to these figures. We shall be presently examining the break-up figures given therein. It will be useful at this stage to refer also to the details of the receipts and expenditure set out in the original counter-affidavit for the State, that of the Joint Secretary (Sri Kelu Erady), and analyse the same:

ADMINISTRATION OF JUSTICE—REVENUE RECEIPTS ACTUALS FOR 1954-56.

		Rupees in lakhs.
Court-fee realised on stamps	..	73.76
Sale of stamped copy paper	..	5.86
Fines and penalties	..	0.11
Miscellaneous	..	0.88
		79.81
Deduct refunds	..	1.29
	..	78.52
Sale of unclaimed and escheated property	..	0.69
Court-fee realised in cash	..	1.79
General fees, fines and forfeitures	..	40.09
Receipts of the Official Assignee	..	0.28
Miscellaneous fees and fines	..	1.84
Recoveries of over-payments	..	0.07
Collection of payments for services rendered	..	0.33
Miscellaneous (including receipts) in England	..	1.65
		46.74
Deduct refund	..	3.14
		43.60
Grand total	..	122.12

JUDICIAL STAMPS ADMINISTRATION

Charges for sales of stamps	..	0.83
Cost of stamps supplied from Central Stores	..	0.80
		1.63

ADMINISTRATION OF JUSTICE

High Court	..	16.90
Administrator-General	..	0.65
Official Assignee	..	0.85
Presidency Magistrate's Court	..	3.57
Civil and Sessions Courts	..	58.31
Courts of Small Causes	..	1.70
Criminal Courts	..	36.70
Law Officers	..	6.26
		124.94

With reference to these figures the argument before us on behalf of the civil suitors may be thus summed up. On the receipts' side, the revenue from Court-fee stamps in the administration of criminal justice must be negligible The actual sources of the receipts under the head " Miscellaneous fees and fines" are not clear. To some extent it may have relation to civil proceedings also. It is quite likely that the head ' General fees, fines and forfeitures' relate to other than Civil Courts and in the context, the head ' fines and penalties ' lakhs 0. 11 may be a receipt on the Civil Side. Broadly looking at the matter and leaving out these receipts as not from Civil Courts, they total Rs. 42.04 lakhs, Rs. 80.08 lakhs may roughly be taken as receipts from the administration of civil justice. A further deduction of Rs. 1.63 lakhs has to be made with reference to the cost of stamps and the charges for the sale of stamps, and we are left with Rs. 78.45 lakhs. On the expenditure side, that on the Presidency Magistrates' Courts, the Criminal Courts, and the Law Officers have to go, and, deducting this from Rs. 124.94 lakhs, the expenditure comes to Rs. 78.41 lakhs. The receipts have been arrived at Rs. 78.45 lakhs. Clearly, the receipts exceed the expenditure, all calculated on a rough and practical basis. No notice has been taken of the considerable time devoted by the District and Sessions Judges and Additional Sessions Judges on Sessions cases. Even in the High Court, a considerable part of the judicial time is spent on criminal cases. One thing emerges from the figures furnished, that if a fairly reasonable allocation of the charges is made between the civil and criminal sides in the administration of justice, the revenue from the civil Courts would exceed the cost of that administration. The argument is telling.

The Law Officers of the State are either those assisting the State in the administration of criminal justice or officers like the Government Pleaders and others assisting the State giving advice in the conduct or defence of civil actions, apart from the Advocate-General. Whether in instituting or defending suits in the State or in seeking opinion of its Law Officers, the State is just in the position of an ordinary litigant, and, though funds of the State may be used to meet those expenses. Certainly it cannot be contended that private suitors have to meet those expenses of the Government. There has been no attempt to justify before us the debiting of the cost of the Law Officers of the State as an item of expenditure to be borne by the suitors in general.

Nor can we see any justification in calling upon the civil suitor to bear the cost of the administration of criminal justice. We may state that there has been no particular argument before us for the State on this aspect of the matter. The maintenance of law and order is one of the fundamental functions of the State, and the setting up and maintenance of the requisite machinery for the administration of criminal justice is a necessary concomitant of its obligation to maintain law and order. The cost of administration of criminal justice may properly fall on the public as a whole and be met from the general revenues of the State. It cannot be said that the magisterial functions have any reasonable relation to the services rendered to the civil litigant.

Sri V. K. Thiruvenkatachari, learned Counsel, questions the very correctness of the figures in the supplemental counter affidavit filed by Sri Shivakumar, Deputy Secretary to Government, on behalf of the State as worked up to show a different picture. It is stated that the figures given require drastic scrutiny and that the statements annexed do not give sufficient details to check the same. In the statements annexed to the supplemental affidavit, on the expenditure side, fresh items are introduced, to mention some, share of cost of Secretariat, Treasury and other general establishments, Executive Magistrates, interest on capital outlay and original works debited to Revenue account. The figures are given only for a few years, and counsel for the suitors charges that here is a desparate effort to show a deficit. But even these new figures as ultimately extracted in Statement III show a deficit only for 1954-55, and right through thereafter there is substantial surplus. A deficit of Rs. 27 lakhs is found for 1954-55 but in the subsequent periods for which figures

are given, 1956-57, 1963-64, 1964-65, the profits are Rs. 11 lakhs, Rs. 10 lakhs and Rs. 9 lakhs respectively. Though an attempt is made in this supplemental counter-affidavit not to charge the civil suitor, with the expenses incurred in the administration of criminal justice and on the other Law Officers of the State, the gap is offset by adding to the administration of civil justice under other heads.

Objection is particularly taken for the civil suitors to a new item of charge in the supplemental affidavit, as a charge on the administration of civil justice, namely, a portion of the costs incurred by the State on other establishments of the State such as the Secretariat, Treasuries, Board of Revenue, Madras Public Service Commission, etc., as pertaining to the administration of justice. On this account, ten per cent. of the expenditure in the Home Department of the Secretariat is debited on the administration of justice. The basis for this deduction is not quite clear. The affidavit of Sri Shivakumar states that for the Home Department in the Secretariat, it has been assumed that 10 per cent of the expenditure relates to its work in connection with the administration of justice ! Taking a broad view of the matter, even the cost of making laws at all stages may be considered to be incurred in the administration of justice. Without laws the suitor can have little relief in Courts. Looked at that way the contribution by the suitors will be a just fraction. But is that the proper approach ? Revenue is essential for the functioning of any organised State and considerably in a welfare State. Equally the administration of justice, maintenance of order and repression of crime are among the prime and inescapable functions of any civilised Government. No one can complain against the State looking to all possible avenues for raising the needed revenue, but the attack here is that the Constitution has empowered only the levy of a fee in Courts. The expenditure which the suitor is specially called upon to bear must have some relation to the services he as suitor seeks. Any way, it is not shown that the Legislature when revising the Court-fees Act in 1955 proceeded on any such data as now furnished.

Thirty-three per cent. of the expenditure incurred on executive Magistrates, who include Collectors, District Revenue Officers, Revenue Divisional Officers and Tahsildars, is also debited under the cost of administration of justice. The reason for this is stated to be that these officers do considerable amount of judicial work in relation to their responsibility under the Cultivating Tenants Protection Act, Fair Rent Act and numerous other statutes. But no account is taken of the realisations from Court-fees under these Acts, the Court-fee payable being Rs. 2 and below. Receipts from the sale of judicial stamps of the denomination of Rs. 2 and below have been taken to relate to petitions presented before public officers, criminal Courts, etc., and left out of account in determining the revenue. On this account a deduction of 15 per cent. of the revenue for Court-fee stamps is made. It is admitted that a rough and ready method has been adopted for the purpose. As the figures for the sale of judicial stamps in Chingleput and Madras districts in a full year alone were readily available, the percentage of 15.5 attributed to stamps of the value of Rs. 2 and below, having regard to the sale of judicial stamps in those districts, has been taken as the basis. Naturally, the deduction is challenged. It is well known that thousands of applications are filed annually in the High Court and the Court-fee payable thereon is Rs. 2. Similarly, thousands of applications are filed in the several City Civil Courts and Presidency Small Cause Courts, the Court-fee payable on these applications being below Rs. 2. Then again, process fees are generally made up of stamps of denominations below Rs. 2. The total volume of these proceedings in all the Courts taken together will be enormous. It cannot, therefore, in fairness be said, based only on the sale of stamps in Madras and Chingleput districts, that 15 per cent. of the revenue from Court-fees should be attributed to the applications made before public officers, criminals Courts etc. A cursory look at the working adopted in the supplemental counter affidavit would show that the balance struck therein cannot be taken straightaway as reasonable. To start with, while deducting from the revenue from Court-fee stamps 15 per cent. as the value of lower denomination stamps, on the expenditure side, the entire

discount on sale of judicial stamps is debited against the administration of civil justice. Again, the receipts from the office of the Official Assignee and other miscellaneous receipts, about four lakhs of rupees, are excluded, along with the expenditure thereon, which is only two lakhs of rupees. We must say that we are not very much impressed by the data now furnished. While it is certainly gratifying to find that the State Government has not specifically pleaded either in the original counter-affidavit or even in the supplemental counter-affidavit that Court-fee is an ideal source of revenue which can be collected without any difficulty and made available for the purposes of general administration, we cannot but express surprise at the last minute attempt at correlation in the manner it has been done now. It was not so attempted in the original counter-affidavit. But as the question before us is in a very narrow compass the validity as a fee of the *ad valorem* levy under Article 1 of Schedule I of the new Court Fees Act of 1955, in the Original Jurisdiction of the High Court—it is not necessary to examine in further detail these figures and see whether or not there is correlation.

The pattern of levy on a tapering scale has been prevalent ever since the institution of court-fees. Under the 1870 Act, a maximum had been fixed. Is it reasonable to levy court-fee at a flat rate? That is the point we are called upon to examine. Originally, when the claim exceeded Rs. 5,000, the total of fees tapered, and over Rs. 50,000 there was a nominal levy. On the Original Side prior to 1949 there was a fixed institution fee, and then a flat rate of Rs. 5 for every Rs. 1,000. Further fees were collected as hearing fee, having relation to the time taken by the High Court in adjudging causes. It may be difficult to follow this system, particularly in the moffussil and, at any rate, since 1949, in the Original Jurisdiction also the Court Fees Act has been adopted.

It is pointed out for the suitors that the effect of the new levy is to bring about a fall in the number of suits instituted in the Original Side of the High Court, and that this will be apparent from the statistics of the institution of suits in the superior Courts on claims of higher values. It cannot be seriously denied that this heavy levy will have a regressive effect on suitors who have to make a claim for large amounts. There can be no two views that cheapening the costs of judicial process and its expedition are essential if the judicial wing of the State is to continue as the palladium of the weak and timid or the wronged suitor. It is not as if that persons who have to make large claims will have ready cash to find the requisite court-fees, nor can it be assumed that they would have the necessary capacity to pay and bear the charges. It is stated for the suitors that there has been no fair and equitable distribution of the cost of administration on all suitors and that the levy now falls grossly disproportionately on those who have to make heavy claims. The charge is that the levy is oppressively disproportionate and inequitable at higher levels and falls harshly on a few. We have not been furnished with clear comparative figures of the income from fees paid by suitors whose claims exceeded Rs. 50,000 prior to the new Court Fees Act, and after the introduction of the new Court Fees Act, or of the income from court-fees in the lower brackets during the corresponding periods. Whether civil suitors as a body should bear the entire cost of the administration of civil justice or just that part of it as may be reasonably related to the special services rendered to the suitors, may be a matter of policy. The argument that the State cannot levy an exorbitant court-fee for making available its machinery for the administration of justice and make the suitors to pay for the entire cost of the administration of justice, when, after all, the State is performing one of its elementary functions by maintaining Courts, cannot be said to be devoid of merits. As said earlier for every man who is forced to go to the Court to establish his rights, ten may get satisfied out of Court. The very existence of Courts would serve as a deterrent in many cases. Again, when the superior Courts in any particular case declare or interpret the law, they no doubt give special relief to a particular suitor, but the declaration of the position in law is for the entire community. Democratic States move and live in law. Learned Counsel, while thus contending that what all could be justified in a welfare State is just a regulatory

fee, would, for the present, limit the challenge to the *ad valorem* levy without limit. When on this question, we are not directly concerned with the total revenue raised or needed from court-fees, and its correlation to the expenditure on administration of justice.

A comparative table showing *ad valorem* court-fees charged in each State as compared with the fees fixed in the Court Fees Act of 1870 taken from the report of the Law Commission (at page 491-492) has been furnished. Under the Court Fees Act of 1870, on a suit of the value of Rs. 50,000, the court-fee payable was Rs. 1,175. The court-fee payable in this State under the new Act is Rs. 3,750. The figures in none of the other States come anywhere near this, the nearest being Punjab, where the fee payable on a claim for Rs. 50,000 is Rs. 2,827-8-0. It is stated that the Court Fees Act has recently been amended in Uttar Pradesh on a scale similar to that now prevalent here. A maximum has always been recognised in most of the States. Under the Central Act of 1870, the maximum leviable was Rs. 3,000. On a claim of the value of one lakh of rupees, the fee leviable here now is Rs. 7,500. Under the Central Act of 1870, it was Rs. 1,425. In Andhra Pradesh it is Rs. 3,427-8-0. In Bombay it is Rs. 2,406-4-0. In Punjab it is Rs. 3,315. And in no State does it come anywhere near the court-fee levied here. The Taxation Enquiry Commission's Report of the year 1953-54, Vol. 3 (at page 107) also gives some figures of the receipts from court-fees and expenditure thereon for 1954-55 for the various States. So far as this State is concerned, the receipt is shown as Rs. 1.35 lakhs and the expenditure as Rs. 1.28 lakhs. The Taxation Enquiry Commission recommended, on the question of reduction of court-fees, the urgent review of the fees of the few State Governments which then derived from them a revenue which substantially exceeded the cost of administration of justice in order that the fees may be suitably reduced and readjusted as soon as possible.

One thing is clear from a consideration of the figures that have been placed before us, that no case has been made out for the *ad valorem* levy without limit and on a uniform scale irrespective of the magnitude of the claim. While it cannot be denied that Court-fee may bear some relation to the magnitude of the claim, it should not be overlooked that it is a fee and intended for the special services which the suitor seeks through the Courts. It is difficult, no doubt, to distribute the fee evenly according to the time taken by the suitor and the labour involved in any particular case. A pattern of levy was therefore followed with a sliding scale and a slab system of levy. Reilly, J., has pointed out in *Corporation of Madras* v. *Spencer & Co.*[1], that where the cost has to be distributed between several persons, it would be unreasonable if the fees are so fixed that the whole cost or a grossly disproportionate part of it was imposed on a particular trade or a few particular trades. This principle should have to be borne in mind in effecting an equitable distribution of the expenditure incurred in the administration of civil justice. It may be that a suit on a promissory note of Rs. 50,000 may take lesser time than a claim on a promissory note of Rs. 500. If a claim for Rs. 20,000 takes 10 hours of judicial time for adjudication, it does not necessarily follow that a claim for Rs. 2 lakhs will take 100 hours of judicial time. It may be over in an hour.

Mr. V. Thyagarajan, learned Counsel appearing for the appellant for probate, urges that the arbitrary and unreasonable character of the *ad valorem* levy gets underlined when a demand is made on the applicant on the entry of caveat of court-fee at one half of 7½ per cent. on the market value of the estate, less the fee already paid. Under the Madras Court Fees Act of 1922 no additional fee was payable on the entry of caveat. The fee levied is in addition to a levy of 2 per cent. upto Rs. 5,000 and 3 per cent. on the excess over Rs. 5,000 as probate duty under Article 6 of Schedule I and section 56 of Act XIV of 1955. Learned Counsel submits that in a probate action the title to the property that may be the subject of the will does not come up for determination, it not being the province of the Court in a testamentary

1. (1929) 57 M.L.J. 71 : I.L.R. (1929) 52 Mad. 764.

suit to go into questions of title with reference to the property disposed of or the validity of the disposition. The probate concluded only the truth and validity and the contents of the will. The representative title of the executor was perfected. Suits relating to immovable property, particularly lands, generally involve greater labour and take larger time of the Court than simple money claims. But these are details in the matter of distributing the burden. We are concerned only with the reasonableness of the levy now challenged. Court-fees, to a certain extent, may properly be in proportion to the claim. The value of the claim has been made a basis of fixing the form for adjudication. The privilege of a first appeal on facts and the forum of the appeal, further appeal and appeal to the Supreme Court depend generally on the value of the suit. In a suit of a small cause nature no second appeal is available. The time taken in Court will to a certain extent depend on the suitor's interest in the litigation. The suitor's interest in the litigation will ordinarily depend on the benefit he hopes to gain therefrom. No doubt the benefit will be relative to the suitor, and depend on several factors, may not be capable of being evaluated in all cases purely in terms of money, but the money value of the claim will have its own weight and relevance. One can, therefore, assume that the value of the claim will haverelevance in fixing the levy, but we can see no correlation when the levy is raised in direct proportion to the claim. In this context we may point out that in the taxation of cost, advocate's fee is not calculated at a uniform rate but tapers, and sharply, as the claim goes up. Irrespective of the magnitude of the claim and the complexity of the case and the anxiety of the suitor, a limit will be reached so far as the service that could be rendered in Court is concerned. Judicial time is not spent in direct proportion to the value of the claim. It may have relation to the question involved. That appears to be the reason behind the maximum court-fee originally prevalent and even now found in some States. We do not say that there should be a maximum. Under the Madras Court Fees Act of 1922 there was no maximum, but after the value of the claim reached Rs. 50,000, the levy though without limit was comparatively a nominal sum. There may be some justification for not fixing a maximum. Human nature being what it is, if no court-fee at all is payable beyond a certain limit, the tendency to swell up the claim may manifest itself in some cases for fairly obvious reasons. Beyond a limit, a regulation fee may be justified. We have not heard any special argument that an ungraded levy and without limit is reasonable. So far as Courts are concerned, they will have to give the same care and attention to all claims irrespective of their magnitude.

For the year 1953, as seen from the extracts from Civil Court's Statistics furnished by the applicants, out of a total number of 1,99,400 suits instituted in all Courts, in only 1,116 suits the claims exceeded Rs. 10,000. Out of 12,905 suits in the city, in only 297 suits the claim exceeded Rs. 10,000. Between Rs. 5,000 and Rs. 10,000 the number of suits were 314 for the city and 1,424 for the entire State. In 1954, out of 11,998 suits instituted in the city, only 303 suits the claim exceeded Rs. 10,000. For the entire State, out of 1,01,335 suits, only 911 exceeded Rs 10,000 in value. In 1955, out of a total of 2,22,398 suits for the State, only 970 suits exceeded Rs. 10,000 in value. In the city out of 12,348, 235 suits alone exceeded Rs. 10,000 in value. In 1956, out of a total of 1,87,758 suits only 908 suits exceeded Rs. 10,000 in their value. In the city out of a total of 11,682 only 260 suits exceeded Rs. 10,000. In 1957 in all 1,26,028 suits were instituted in the State and out of this only 589 exceeded Rs. 10,000 in value. In the years 1959, 1960 and 1961, there has been some increase in suits exceeding Rs. 10,000 in value, 903, 1,055 and 1,183 respectively. This increase is marked in the Sub-Courts outside the city. Suits exceeding Rs. 10,000 in value filed in the High Court in the respective years are 50,145 and 66 only. We do not have statistics of institution of suits over Rs. 50,000 in value, or even of suits exceeding Rs. 20,000 when only the levy may get heavy. But even the percentage of suits exceeding Rs. 500 in value in the year 1962 was only 28.06; 29.23 being the corresponding figures for the year 1961 (Civil Court Statistics of the State for 1962). Compared with the total receipts from

court-fees the contribution from suits of higher values having regard to the percentage of such suits may be small, but we have to view the matter from the standpoint of the suitor who pays. The old Court Fees Act when providing for *ad valorem* levy made some attempt to rationalise the structure in the related sphere having regard to the character of the suit and its value. For suits of a small cause nature the court-fee upto Rs. 500 was fixed at 7½ per cent. of the value. In all other cases of *ad valorem* levy, the court-fee starting at half-a-rupee for suits of the value of Rs. 5 and below, upto one thousand, the rate was Rs. 12.50 per cent. levied on slabs of Rs. 5 upto rupees one hundred and on slabs of Rs. 10 upto rupees one thousand. When the value exceeded Rs. 1,000, the rate was Rs. 7-50 on the slabs of Rs. 100 in excess of Rs. 1,000 upto Rs. 5,000. The court-fee payable on a claim of Rs. 100 was Rs. 11-3-0, on a claim of Rs. 1,000 Rs. 112-7-0 and on a claim of Rs. 5,000 Rs. 412-7-0. The present Court Fees Act which in so many words is intended to rationalise the levy of court-fees makes no distinction between small cause suits and other suits—it practically ignores that all suits would take some minimum of administrative and judicial time if contested, irrespective of the value that the time demanded for disposal would depend on the complexity of the case, and will not be in direct proportion to its value. Petty claims may deserve some consideration and lighter levy. Minimum fees are prescribed for certain classes of suit—that no doubt is as it ought to be. Refund of court-fee is provided for in certain cases. There may be much to be said in favour of these features. But it is the departure from the time tested mode of an equitable distribution of the burden while providing for *ad valorem* levy, that makes the new Act unreasonable in its incidence. It is not even argued for the suitors that the original scale of levy should not be enhanced. They may not, having due regard to the increased cost of all services. Here it is not just any resulting surplus only that invalidates the levy. The surplus may be utilised in furtherance of the object of the levy—better facilities for speedy and efficient rendering of justice in Courts—amenities may be given to suitors which, it is common knowledge, is woefully lacking in our Courts. A continued surplus may require a reconsideration of the scale of fees. We have not examined the question from that angle. The problem is in the distribution of the levy in a practical and reasonable manner so as to fall fairly equitably on all suitors, that no particular class or section of them is disproportionately hit and made to bear more than their fair share of the expenditure on the administration of justice, on considerations not germane in the context of the levy authorised by law. There can be no exact correlation, but the present levy or its incidence on suits with large claims cannot but be manifestly unreasonable. As it is, as the value of the claim goes up, the levy becomes more and more unrelated to the object of the levy. A few suitors would be made to bear a heavy share of the expenditure unrelated to the services required by them with the result that, when the claims are high, only one of the two essential elements of a levy to be regarded as a 'fee' is left. While the occasion for the levy is the demand of special service by the suitor that is, one element is present, there is no reasonable correlation between the levy and the services, that is the second element is lacking. The levy becomes excessive, grossly disproportionate, and unreasonable *qua* the particular suitor; it ceases to be a 'fee' and becomes a tax for him.

If the financial capacity of the suitor is assumed, because of the heavy claims he makes and the levy is related to it, then again the characteristic of fee is ignored. For the same kind of service why should one contribute more than the other? Differences in the nature of litigation may justify different charges. Law is the same for the rich and the poor. No different law is given to the rich to make them pay more. Special concessions may be, and are, shown to those who do not have the means to pay the court-fee in the first instance. But the fee is then realised from the opposite party or from the fruits of the litigation. A fee in its technical sense is levy on a principle just the opposite of tax—a tax is paid for the common benefits conferred by the Government on all tax-payers; a fee is a payment made for some benefit sought for by the payer. When a suitor is singled out to bear a dispro-

portionately heavy part of the cost of the administration of justice, he is to a certain extent called upon to pay for a State activity in which he is no more interested than any other citizen. The suitor shares the benefit of the existence of the Courts, the Magistrate and the administration of law and order by the State like every other citizen. Any levy on a suitor in the civil Court whereby revenues are realised generally and unrelated to his cause will to that extent, be an impost in the nature of a tax.

In the light of the foregoing discussion we have no hesitation in holding that Article 1 of Schedule I of the Madras Court Fees Act of 1955 and the Madras High Court Fees Rules, 1956, in so far as they set out for levy of court-fees in the High Court in the exercise of its Original Jurisdiction, Article 1, Schedule I of the Madras Court Fees and Suits Valuation Act (XIV of 1955), are invalid and *ultra vires* as an impost in excess of the powers conferred on the State Legislature and the High Court for levying fees on proceedings in the exercise of its Original Jurisdiction. Article 1 of Schedule I of the Madras Court Fees and Suits Valuation Act, (XIV of 1955) and rule 1 of Order 2 of the High Court Fees Rules, 1956 to the extent it incorporates the said article, in their application to the High Court in its Original Jurisdiction are therefore struck down.

It is unnecessary for us to examine in further detail the validity or the reasonableness of the other provisions of the Madras Court Fees and Suits Valuation Act of 1955. It was contended for the suitors that the effect of our striking down the applicability of Article 1, Schedule I of the Court Fees Act of 1955, would be, so far as the High Court is concerned, to revive the Court Fees Act of 1870, as amended in Madras in 1922 which stood repealed by the new Act. Learned Counsel in this connection referred us to a passage from Cooley's Constitutional Limitations, Eighth Edition, Vol. 1, at page 378, where it is stated:

> " But other cases hold that such repealing clause is to be understood as designed to repeal all conflicting provisions, in order that those of the new statute can have effect; and that if the statute is invalid, nothing can conflict with it, and therefore nothing is repealed."

Reference was also made to *Parameswaran Nambudiripad* v. *P. R. Swami and others*[1], a decision of Govinda Menon and Krishnaswami Nayudu, JJ. The following observations therein were relied on in particular :

> " We are now concerned with the effect of a declaration of Court that the Amending Act, which repealed certain provisions of the original Act, is void under Article 13 of the Constitution. The effect of a Court declaring a particular statute as void is the same as a repeal, the result being that the statute declared void never existed............If we declare the entire amending statutes as wholly void, the original enactment, namely, Act XIV of 1930 which was sought to be amended by the Acts, would remain in force reinstated in its effectiveness."

In our view the principle enunciated in the aforesaid decisions can have no application in the present case. Here the particular rule of the Original Side, which incorporated the Madras Court Fees Act, 1955, as already stated, runs as follows :

> " The fees in all suits and proceedings instituted on or after the 19th day of May, 1955, and all proceedings by way of appeal or otherwise arising therefrom shall be levied by the Registrar, the Sheriff and the Reserve Bank of India, as the case may be, according to the provisions of the Madras Court Fees and Suits Valuation Act, XIV of 1965."

As pointed out at the outset the Madras Court Fees Act by its own force is applicable to proceedings on the Original Side of the High Court. We are striking down only the levy found in Article 1, Schedule I of the Madras Court Fees and Suits Valuation Act (XIV of 1955) in its application to the High Court. We have not dealt with or considered the validity or otherwise of the other parts of the Act. The effect of striking down the Article in question will not be to revive, to that extent, the earlier

1. Referred Case Nos. 86, 63, 87 and 88 of 1954 (unreported case).

High Court Fees Rules, 1949 for the High Court. Again the earlier 1949 Rules adopted the then current Court Fees Act, and section 87 of the new Act has specifically repealed that Act, the Court Fees Act of 1870, as applied in Madras. It was not contended before us on either side, that the result of striking down Article I of Schedule I in its application to the High Court will necessitate the declaration of the invalidity of the entire Court Fees Act, and so we have refrained from examining the position.

There is a prayer in the writ petitions for a direction to the Registry of the Court to levy fees in accordance with the High Court Fees Rules of 1933, and the Court Fees Act of 1870. We have declared the invalidity of the levy now in force. It is not for the Court to declare what the rules should be. In the matters now before us, to the extent there is prayer for an order directing levy of fees in accordance with the High Court Fees Rules of 1933 and the Court Fees Act of 1870 as amended and in force immediately prior to the enactment of Madras Act XIV of 1955, there can be no relief.

In Application Nos. 2445 of 1964 in C.S. Nos. 43 of 1961 and 2486 of 1964 in C.S. No. 7 of 1959, there are prayers for refund of the court-fees paid. The petitioners therein restrict their claim for refund to the excess over the rates specified in the Court Fees Act of 1870, as amended by the Madras State Court Fees Act V of 1922, the excess they have to pay by reason of the levy made under the Court Fees Act of 1955 over and above what they would have paid if Madras Act V of 1922 had been in force. As we have held that the levy in terms of the new Act is *ultra vires* and unconstitutional, there can be no doubt about the petitioners' claim for refund of the court-fees paid. It is not for the Court, as already stated, to substitute Madras Act V of 1922 in the place of Madras Act XIV of 1955. But the refund claimed is limited only to the difference, and there will be an order for refund of the difference as prayed for.

On the writ petitions we hold that the levy of court-fees in the Original Jurisdiction of the High Court under rule 1 of the Madras High Court Fees Rules, 1956, as statutorily provided for under Article 1, Schedule I of the Madras Court Fees and Suits Valuation Act, 1955, is invalid and unconstitutional.

It is not our province to indicate how the pending or proposed proceedings should be stamped. However, to enable the appropriate authorities to take the required steps in the matter and to avert administrative difficulties in the interregnum, we suspend the operation of our orders by two months. There will be no order as to costs.

V.K. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T. RAMAPRASADA RAO.

Mannammal .. *Petitioner**

v.

Sesha Mudaliar and others .. *Respondents.*

Madras Panchayat Act (XXXV of 1958), *section* 15 (4) *and section* 178 (11), *rules and the relevant notifications—" Co-option "—Meaning of—If amounts to election contemplated under the Act.*

The relevant notification issued in the exercise of the powers conferred by sub-clause (11) of section 178 states that save as otherwise provided no election held under the Madras Panchayat Act, whether of a member or Vice-President of a Panchayat, shall be called in question, except by election petition presented in accordance with the rules framed thereunder. In the matter of co-opting a woman member, no process of election is contemplated under the Act. Co-option, under section 15 (4) of the Act takes place when some member of the Panchayat

* C.R.P. No. 871 of 1966. 13th April, 1967.

proposes the name and the proposal is put to vote, but that is not an election as contemplated by the Act.

Petition under Article 227 of the Constitution praying the High Court to revise the order of the Election Commissioner, District Munsif, Kallakurichi, dated 15th March, 1966 in O.P.No. 49 of 1965.

P. R. Gokulakrishnan and *K. Balasubramaniam*, for Petitioner.

T. V. Balakrishnan, for Respondents.

The Court delivered the following

JUDGMENT.—This civil revision petition raises an interesting question under the Madras Panchayats Act, 1958. The petitioner's election was called into question by an election petition filed by the respondents herein before the Election Tribunal constituted under the Act in the normal course. The petitioner before me raised the question whether such an election petition before the Election Tribunal constituted under the Act is maintainable, as she was a member who was co-opted under section 15 (4) of the Act and not elected by the citizens of the Panchayat. The Election Tribunal, while considering the question and agreeing with the definition of co-option in the Chambers Twentieth Century Dictionary, held that co-option mean election. It therefore held that it had the right to investigate into the merits of the so-called election petition filed before it under Notification No. 10 issued in exercise of the powers under Clause (2) of sub-section (2) of section 178 of the Madras Panchayats Act, 1958. Rule (1) of Notification 10 issued in exercise of the powers conferred by sub-Clause (11) of sub-section 2 of section 178 provides a forum for the decision of election disputes relating to Panchayats. It states that save as otherwise provided no election held under the Madras Panchayats Act, whether of a member, President or Vice-President of a Panchayat, shall be called in question except by an election petition presented in accordance with the rules framed thereunder. Therefore, it has to be decided in the instance case whether the petitioner, who was co-opted as a lady under section 15 (4) of the Panchayat Act of 1958, should be deemed to have been elected within the meaning of Notification 10 referred to above. It is unnecessary to deal with the fundamentals and the dictionary meaning of the expression, as the matter appears to be covered by authority of this Court reported in *S. Pichaimuthuraja* v. *Kaliaperumal*[1], Srinivasan, J., while considering the import of the expression 'co-option' and particularly with reference to co-option of a woman member under section 15 (4) of the Act, observed as follows :—

> " In the matter of co-opting a woman member, no process of election is contemplated under the Act. It may no doubt be that the manner by which co-option could be effected by the Panchayat is that some member of the Panchayat proposes the name and the proposal is put to vote, but that is not an election as contemplated by the Act. "

As pointed out by Maxwell on Interpretation of Statutes, 11th Edition, reliance on Dictionary meaning has to be deprecated and the meanings provided for in dictionaries need not be taken as authoritative, exponents of the meanings of words used in Acts of Parliament.

Further, having regard to the context in which the word " co-option " is used in section 15 (4), I am of the opinion that it cannot be placed in juxtaposition to the word "election" so that one can be interchanged with the other, under appropriate circumstances. I do not therefore think that the Election Tribunal had any jurisdiction to entertain the application and much less deal with the merits thereon. The order of the Election Tribunal is set aside as having been passed without any jurisdiction thereto. This civil revision petition is allowed with costs.

V.M.K. ——— *Petition allowed.*

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1. (1966) 1 M.L.J. (S.N.) 27.

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. M. ANANTANARAYANAN, *Chief Justice*, MR. JUSTICE P. RAMAKRISHNAN, AND MR. JUSTICE M. NATESAN.

The Chief Controlling Revenue Authority, Madras .. *Applicant**

v.

Messrs. Pioneer Spinners Private Ltd., Shencottah .. *Respondent.*

Indian Stamp Act (II of 1899), Schedule I, Articles 5 and 6—Agreement—Deposit of title deeds and execution of Articles of Agreement regarding repayment of loan—Bargain relating to deposit of title deeds not embodied in the Articles of Agreement—Applicability of proper Article—Interpretation of statutes.

A mortgage by deposit of title deeds, does not require any writing in law. Besides the deed and the deposit, what is required is an intention that the deeds shall be security for the debt. The existence of the intention is a matter for inference from facts.

An instrument to fall under Article 6 must be an agreement relating to deposit of title deeds. The expression " that is to say " in Article 6 is explanatory and in the explanation, there is also a limitation. The Article takes in the most common class of equitable mortgages by deposit of title deeds accompanied with a memorandum of charge containing the terms of the mortgage. The mere fact that there is reference to the original proposal, and the proposal is made the basis for the Articles of Agreement, and there is thus reference in a way to the deposit of title deeds and the document deposited are also specified in the articles of agreement, cannot make the instrument itself the depository of the bargain between the parties relating to the deposit of the title deeds. The phrase " relating to " in Article 6 cannot be read as merely meaning " connected with " .

Statutes imposing duties are to be so construed so as to make any instrument liable to stamp unless manifestly within the intention of the Legislature.

As parties can put through a transaction of loan on security furnished by the deposit of title deeds without an instrument for the said purpose when they do so, the Stamp Act cannot reach it and treat an instrument made for a collateral purpose, referring to the deposit incidentally as an agreement relating to deposit of title deeds. It is only the instrument which itself is the agreement relating to deposit of title deeds, that is taken in under Article 6.

Held on facts that, it cannot be said that in the present case, that the deposit was contemporaneous with the execution of the instrument, and the instrument was intended to evidence the deposit of title deeds. The instrument by itself does not evidence any deposit of title deeds. It would fall under Article 5 of Schedule I of the Stamp Act.

Case regard under section 57 of the Stamp Act by the Chief Controlling Revenue Authority, Madras, for the decision of the High Court on the following question *viz.*, " whether the instrument in question falls under Article 6 or Article 5 of Schedule I of the Indian Stamp Act, 1899."

The Additional Government Pleader, for Applicant.

M. L. Nayak, for Respondent.

The Judgment of the Court was delivered by

Natesan, J.—This is a reference under section 57 of the Indian Stamp Act and the question for decision is, whether the instrument in the case falls under Article 6 of the Stamp Act as an agreement relating to deposit of title deeds or is only an agreement falling under Article 5. To get at the true character of the instrument in question, it is necessary to briefly refer to the circumstances in which it came to

* Referred Case No. 16 of 1965. 21st April, 1967.

be executed and the material terms of this instrument. The executants, the respondents herein, on 13th February, 1963 applied to the Canara Bank Ltd., Advance Department, Bangalore, for a loan of Rs. 8,00,000 for business purposes at the Coimbatore Office of the Bank, offering to secure the repayment of the loan, (1) by executing in favour of the Bank a document termed "Articles of Agreement" for Rs. 8,00,000, with other relative papers and (2) by delivering and depositing with the Bank with intent to create security thereon title deeds of properties set out in the schedules to their proposal. The proposal contained the list of documents, which they would be depositing, the description of the properties to which the title deeds related, immoveable properties including machineries. On the Bank expressing their willingness to grant the loan, on 21st February, 1963, the executants called at the Coimbatore Office of the Bank and deposited the title deeds of their properties as security for the loan of Rs. 8,00,000 which they had. The petitioners also executed in favour of the Bank the articles of agreement embodying the terms and conditions governing the repayment of the loan. It is the stamp payable on this instrument, the articles of agreement that is now in question. The executants have stamped it under Article 5 of the Stamp Act. According to the executants, the articles of agreement do not relate to the deposit of title deeds; but is only a collateral agreement governing the repayment of the advance of Rs. 8,00,000 and matters incidental to the advance. The instrument, no doubt, in the annexed schedule contains a list of title deeds of property, which had been deposited. For the Revenue, emphasis is laid on certain terms and provisions of the instrument in particular to the reference in the preamble to the borrower's proposal dated 13th February, 1963, a copy of which is annexed to the articles of agreement and the covenants of the agreements to the effect that:

"(*a*) the borrower's proposal shall be deemed to constitute the basis of this agreement and of the loan to be advanced by the Bank; and

(*b*) that the advance shall be governed by the terms contained in the agreement as well as in security documents listed in the schedule."

A provision in clause (6) of the agreement entitled the Bank to enforce the security for the whole advance upon the happening of the events mentioned therein, notwithstanding other provisions in the instrument and clause (7) entitled the Bank to assign the debt and the benefit of the agreement and the securities for the advance, and the security documents to the Refinance Corporation for Industry (P.), Ltd., as security for the refinance obtained by the Bank from the said Corporation. But what has to be noticed is, that in this elaborately drawn-up articles of agreement, containing the terms and conditions governing the loan or advance and the mode of repayment, there is no record of the bargain relating to the deposit of title deeds. The instrument styled articles of agreement, even though it is executed on the date of the deposit of the title deeds, does not itself evidence or contain the terms regarding the deposit of title deeds, or the bargain for deposit of title deeds, In the original proposal which emanated from the executants to the Bank, the executants had offered (1) to execute the articles of agreement and (2) to deposit the title deeds of their immoveable property as security. The deposit of title deeds and the execution of the articles of agreement may all be in the course of the same transaction. But the articles of agreement does not itself embody the bargain for security by the deposit of title deeds; in fact it proceeds upon the existence of the security when it is executed. It itself does not bring about any security by deposit of title deeds.

The material part of Article 6 of the Stamp Act reads:

"Agreement relating to deposit of title deeds .... that is to say, any instrument evidencing an agreement relating to ....

(1) the deposit of title deeds of instruments constituting or being evidence of the title to any property whatever (other than a marketable security).

(2) .... where such deposit .... has been made by way of security for the repayment of the money advanced by way of loan or an existing or future debt .... "

The question here is whether the articles of agreement under consideration is an agreement relating to deposit of title deeds. The first column of the Schedule I of the Stamp Act specifies the instrument and the second column the duty payable on the instrument. An instrument to fall under Article 6 must be an agreement relating to the deposit of title deeds. The expression "that is to say" in Article 6 is explanatory and in the explanation, there is also a limitation. The Article takes in the most common class of equitable mortgages by deposit of title deeds accompanied with a memorandum of charge containing the terms of the mortgage. Can it be said that the instrument in question here evidences an agreement relating to the deposit of title deeds? This aspect, we have to consider from the well established principle that oral proof cannot be substituted for the written evidence of any agreement, which the parties have put into writing. If the writing evidences the agreement, it must be taken that the parties themselves have tacitly considered the writing as the repository and appropriate evidence of the agreement. Can it be said that the articles of the agreement in this case is the repository of the agreement between the parties relating to the deposit of title deeds as security for the advance? Unless, the instrument could be so read, it cannot be said that it is an agreement relating to deposit of title deeds, or expanding the same concept, an instrument evidencing the agreement relating to deposit of title deeds, by way of security for advance. The mere fact that there is reference to the original proposal, and the proposal is made the basis for the articles of agreement, and there is thus reference in a way to the deposit of title deeds and the documents deposited are also specified in the articles of agreement, cannot make the instrument itself the repository of the bargain between the parties relating to the deposit of the title deeds. The proposal contains a provision for the execution of the document called "articles of agreement" and with reference to this document, certainly the proposal does form a basis. In our view, the phrase "relating to" in Article 6 cannot be read as merely meaning "connected with." Statutes imposing duties are to be so construed so as to make any instrument liable to stamp unless manifestly within the intention of the legislature.

A mortgage by deposit of title deeds, does not require any writing in law. Besides the deed and the deposit, what is required is an intention that the deeds shall be security for the debt. The existence of the intention is a matter for inference from facts. The existence of the intention may be established by written documents alone, or coupled with oral evidence, or oral evidence only. In a particular case, the circumstances may warrant the inference of a deposit for security from the very fact of deposit. The question whether oral evidence is admissible to explain or establish a deposit of title deeds, would depend on whether the writing itself has constituted the bargain between the parties. As parties can put through a transaction of loan on security furnished by the deposit of title deeds, without an instrument for the said purpose when they do so, the Stamp Act cannot reach it and treat an instrument made for a collateral purpose, referring to the deposit incidentally as an agreement relating to deposit of title deeds. It is only the instrument which itself is the agreement relating to deposit of title deeds, that is taken in under Article 6. It cannot be said that in the present case, that the deposit was contemporaneous with the execution of the instrument, and the instrument was intended to evidence the deposit of title deeds. The instrument by itself does not evidence any deposit of title deeds.

We are, therefore, of the view that the instrument is not an agreement relating to the deposit of title deeds, governed by Article 6 of the Stamp Act. It would fall under Article 5 of Schedule I of the Stamp Act.

The reference is answered accordingly. No order as to costs.

S.V.J. ——— *Answered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. S. KAILASAM.

Workmen employed in The United Bleachers Private Ltd., by the Secretary, Coimbatore District Textile Workers' Union .. *Petitioner**

v.

The Management of United Bleachers (P.) Ltd. and another .. *Respondents.*

Industrial dispute—Wrongful dismissal or retrenchment—Relief of reinstatement—If and when can be refused.

Constitution of India (1950), *Article* 226—*Erroneous order of Labour Court ordering compensation in lieu of reinstatement—Interference under Article* 226—*Scope.*

The normal relief in the case of wrongful dismissal or retrenchment is one of reinstatement. Reinstatement cannot be denied merely on the ground that the employer had engaged alternative hands or that there had been protracted litigation and delay in the matter or that the relationship between the Management and the workman is strained. It is only in exceptional cases in which it is not in the interests of the industry to order reinstatement that reinstatement can be refused.

The High Courts can issue prerogative writs and other directions or orders, which would enable the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this Country. Some limitations are implicit in Article 226 of the Constitution of India for the purpose of directing the power through defined channels. However, the limitations envisaged would not limit the power of the High Court to grant the relief of reinstatement to a worker when it finds that the order of the Labour Court directing payment of compensation in lieu of reinstatement is erroneous.

Petition (No. 3533 of 1965) under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records in I.D. No. 41 of 1961 on the file of the Labour Court, Coimbatore, and quash its Award dated 22nd June, 1965, and published in Supplement to Part II, Section 1 of the *Fort St. George Gazette*, dated 14th July, 1965 and printed at pages 9 to 13 thereof, in so far as it fails to grant the relief of reinstatement of P. Krishnan.

Petition (No. 677 of 1966) under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records in the above I. D. No. 41 of 1961 and quash the order made therein.

B. Dolia, for Petitioner in W.P. No. 3533 of 1965 and for 1st Respondent in W.P. No. 677 of 1966.

M. R. Narayanaswami, for 1st Respondent in W.P. No. 3533 of 1965 and for Petitioner in W.P. No. 677 of 1966.

The Court made the following

ORDER.—Both the petitions are filed against the order of the Labour Court, Coimbatore, in I.D. No. 41 of 1961, dated 22nd June, 1966. W.P. No. 3533 of 1965 is by the workmen employed in the United Bleachers (P.), Ltd., represented by the Secretary, Coimbatore District Textile Workers' Union, against that portion of the order which failed to grant the relief of reinstatement of the worker

* W. P. Nos. 3533 of 1965 and 677 of 1966. 27th June, 1967.

P. Krishnan. W.P. No. 677 of 1966 is by the management of the United Bleachers (P.), Ltd. against the order of the Labour Court, in so far as it found that the delay in resorting to the dispute by the workmen was justified and that the worker, P. Krishnan, would be entitled to the relief it had ordered. The two writ petitions may be dealt with together.

P. Krishnan, who was working as the Supervisor, Grade A, in the Stitching Section was suspended in August, 1957, and was dismissed on 8th October, 1957. A dispute I.D. No. 1 of 1958 was raised, and the Labour Court, Coimbatore, by its order dated 10th March, 1958, directed the reinstatement of P. Krishnan with back-wages. On 10th April, 1958, the Management wrote to Krishnan that there was no vacancy in any post in which he could be reinstated. Krishnan and the labour protested, and on 4th June, 1958, the Management decided to take back Krishnan to work from 10th June, 1958. On 10th June, 1958, Krishnan presented himself in the factory; but the Management informed him that he was retrenched under section 25-F of the Industrial Disputes Act. They also tendered compensation which Krishnan refused to receive. On 22nd September, 1958, the Labour Officer wrote to Government for sanction to prosecute the Management under section 29 of the Act, for non-implementation of the order of reinstatement passed by the Labour Court in I.D. No. 1 of 1958. Government granted sanction, and the Management was prosecuted before criminal Court in C.C. No. 195 of 1959. Two officers of the company were convicted. They preferred Criminal Appeal No. 79 of 1960, where the conviction was set aside on 27th June, 1960. The State preferred appeals against the acquittal of the officers, in Criminal Appeals Nos. 486 and 939 of 1960, which were dismissed by this Court on 29th January, 1962.

In the meantime, when the Management purported to retrench Krishnan, the Labour protested and requested the Labour Officer to take action. On 22nd September, 1958, one Mohammed was appointed to the post to which Krishnan was entitled, and the labour staged a strike. The Management dismissed 144 workmen on 22nd September, 1958. An industrial dispute, I.D. No. 89 of 1958 was raised regarding the dismissal of the workmen, but the proceedings went against the workmen, and a writ petition and writ appeal to this Court also failed. The factory was closed from 22nd September, 1958, the date of the strike, and was reopened only on 10th February, 1959. After the factory was reopened, the management took back the old workers as new entrants from August, 1959. On 3rd September, 1960, the Management and the petitioner-Union came to an agreement regarding the service conditions of the workers. But Krishnan was not taken back, and the Labour Union wrote to the Management on 12th January, 1961 demanding the reinstatement of Krishnan. The Management refused to reinstate Krishnan, and a reference was, therefore, made regarding this dispute on 5th September, 1961. The dispute was taken up as I.D. No. 41 of 1961. It related to the non-employment of P. Krishnan. An award was passed on 8th December, 1961, in which it was found that the management had violated section 25-G of the Act. It also directed that P. Krishnan be taken as a C grade helper from 10th June, 1958. Aggrieved by this order directing reinstatement of Krishnan as C grade helper, the Management filed W.P. No. 129 of 1962. This petition was dismissed on 21st April, 1964. In dismissing the writ petition, this Court observed that the order in so far as it directed reinstatement was not disturbed but quashed the direction that Krishnan should be reinstated in the post of helper. The direction for payment of back wages was confirmed, and the Labour Court was directed to dispose of the matter afresh, on the question whether Krishnan should be reinstated in the post of Supervisor. The Management took up the matter in W.A. No. 250 of 1964. In appeal, the finding that the retrenchment was illegal was confirmed. It directed that the relief of reinstatement would have to be considered with regard to the post from which the worker was retrenched, namely, of Supervisor in the concerned category. Regarding back-wages, the Court gave certain directions, and directed that the question whether there was any delay or laches on the part of organised labour and whether that would disentitle the concerned worker to the

relief either of reinstatement or of back-wages or of both must be left to the decision of the Labour Court upon the facts of record.

In pursuance of this order of remand, the matter was taken up by the Labour Court, and the following issues were framed, *viz.*,

"(*i*) whether there was any factual delay, (*ii*) whether this disentitled the worker to the relief of reinstatement as a Supervisor, (*iii*) if there was any delay, is it justified or explained? and (*iv*) if the delay, if any, will affect back-wages from 10th June, 1958 to 12th January, 1961, the date the Union took up the dispute."

The Labour Court recorded its findings as follows. It found, as a matter of fact, that there was delay of three years by the Union in moving the Labour Officer. It also found that the delay would not disentitle the worker to the relief of reinstatement for Supervisor's post. It further found that the delay had been explained and justified by the Union. Regarding the relief of back-wages, the Labour Court found that P. Krishnan was entitled to back-wages from 10th February, 1959 to 12th January, 1961. The Labour Court, instead of directing reinstatement, taking into consideration the strained relationship between the Management and the worker and the fact that no action was taken by the Union questioning the appointment of Mohammed as Supervisor in the place of Krishnan, awarded five years' pay as the value of reinstatement for the supervisor's post.

Mr. Dolia appearing for the workmen in W.P. No. 3533 of 1965 challenged the order of the Labour Court mainly on three grounds. He submitted, firstly that, as the Labour Court had found that the delay had been satisfactorily explained, according to the order of remand, it ought to have granted the relief of reinstatement with back-wages and should not have given an entirely new relief of five years' compensation for non-reinstatement. Secondly, he submitted that the two grounds relied on by the Labour Court for not granting reinstatement, namely, that the relationship between the management and the worker was strained and that the labour did not question the appointment of Mohammed in the place of Krishnan, were not valid in law. Thirdly, he submitted that the order of the Labour Court suffered from obvious mistakes regarding calculation of back-wages.

In W.P.No. 677 of 1966, Mr. M. R. Narayanaswami, learned Counsel for the petitioner-management submitted that the Labour Court, having found that there was in fact a delay of three years, was in error in holding that the delay was justified.

The third contention of Mr. Dolia that there are obvious mistakes in the calculation of back-wages has to be accepted. P. Krishnan was not allowed to join on 10th June, 1958. The management purported to retrench him from that date. Krishnan will be entitled to back-wages from that date. The petitioner-union demanded reinstatement of Krishnan on 12th January, 1961, and if the delay is justified Krishnan will have to be paid back-wages from 10th June, 1958 to 12th January, 1961 and for the subsequent period. But as the factory was closed from 22nd September, 1958 to 10th February, 1959, Krishnan will not be entitled to back-wages for that period. But excluding the period from 22nd September, 1958 to 10th February, 1959, Krishnan will be entitled to back-wages from 10th June, 1958 upto the date of reference, *viz.*, 5th September, 1961. This point is answered accordingly.

The next contention of Mr. Dolia is that the order of remand by the Bench of this Court in W.A. No. 250 of 1964 was limited, and the scope of remand was to decide whether the delay on the part of the labour was justified. It was directed that the Labour Court should decide whether there was delay or laches on the part of organized labour and whether that would disentitle the concerned worker to the relief either of reinstatement or of back-wages or of both. The Bench held that the finding that retrenchment was illegal would stand. It also held that the claim for back-wages could not be questioned. The decision regarding delay or laches on the part of organised labour was for the purpose of deciding whether it would

disentitle the concerned worker to the relief either of reinstatement or of back-wages or both. In other words, the order of remand was restricted only to the question whether the delay would disentitle Krishnan from being reinstated or from claiming back-wages. The order also made it clear that the relief of reinstatement would be with regard to the post from which the worker was retrenched, namely, Supervisor in the concerned category. The question whether, in lieu of reinstatement, compensation could be awarded was not left open by the order of remand. It was, therefore, the contention of Mr. Dolia that, when once the Labour Court found that the delay was satisfactorily explained, the only course that was available to the Labour Court was to direct reinstatement. Mr. M.R. Narayanaswami, learned Counsel for the management, submitted that the order of the Bench was wide enough to include a decision by the Labour Court, as to whether P. Krishnan should be reinstated or compensation awarded in lieu of reinstatement. On the clear wording of the direction of the Bench of this Court in W.A. No. 250 of 1964, I am unable to accept the contention of the learned Counsel for the management.

Mr. M. R. Narayanaswami submitted that the finding of the Labour Court, that the delay was justified in the circumstances of the case, was not sustainable. He submitted that the Labour Court directed reinstatement on 10th March, 1958 in I.D. No. 1 of 1958. Krishnan was not reinstated but the management retrenched him on 10th June, 1958. Though Krishnan was not reinstated on 10th June, 1958, he submitted that the labour did not protest or raise any dispute till 5th September, 1961. He submitted that even the letter of the Labour-Union dated 12th January, 1961 asking for reinstatement of Krishnan referred only to the non-compliance with the directions in I.D. No. 1 of 1958, but did not protest against the retrenchment of Krishnan on 10th June, 1958. It may be remembered that Krishnan was directed to be reinstated on 10th March, 1958, and the management on 10th April, 1958 informed Krishnan that no post was available for absorbing Krishnan. The labour protested, and on 4th June, 1958 the management decided to take Krishnan back. When Krishnan presented himself on 10th June, 1958, the management retrenched him. The labour protested and wrote to the Labour Officer praying that steps might be taken against the management for not implementing the award in I.D. No. 1 of 1958. In this connection, it may be noted that the labour was not clear in its mind as to whether it was complaining against the failure of the Management to reinstate Krishnan or it was questioning the retrenchment by the Management of 10th June, 1958. What the Labour wanted was providing work for Krishnan. The Labour Officer as well as the Government were under the impression that the award in I.D. No. 1 of 1958 was not implemented, and therefore criminal proceedings were taken, which ultimatly ended in favour of the Management. When one Mohammed was appointed in the place of Krishnan, on 22nd September, 1958; the Labour protested by staging a strike, which resulted in the closing of the factory and the dismissal of 144 workmen. All these would show that, though the workers were not clear about the complaint which they were making, they were certainly agitating against the Management not providing work for Krishnan. The criminal proceedings finally concluded on 29th January, 1962. After the factory was reopened on 10th February, 1959, and the Management and the Union agreed on the service conditions in September, 1960, and when Krishnan was not provided with work till January, 1961 the Union asked for the reinstatement of Krishnan. Excluding the time during which the factory was closed from 22nd September, 1958 to 10th February, 1959, in the intervening months the Management and the Labour settled their dispute except in regard to the reinstatement of Krishnan . When the petitioner-union ultimately found that Krishnan was not reinstated, it prayed for the reinstatement, and finally the present reference was made on 5th September, 1961. Taking all these circumstances into account, I am unable to state that the conclusion arrived at by the Labour Court, that the delay has been satisfactorily explained, is erroneous. On the finding that the delay had been explained, the proper order by the Labour Court would have been a direction to the Management to reinstate P. Krishnan.

Mr. M.R. Narayanaswami, learned Counsel appearing on behalf of the Management, submitted that this Court would be slow to interfere with an order of the Labour Court directing payment of compensation in lieu of reinstatement, taking into consideration the facts of the case. He submitted that though normally when dismissal or retrenchment was held to be illegal, the normal relief would be one of reinstatement, the interest of the smooth running of the industry should not be overlooked, and taking into consideration the fact that this dispute has been pending from October, 1957 and the fact that the Labour did not protest seriously against the employment of Mohammed in the place of Krishnan and also the circumstances that the relationship between the Management and P. Krishnan had greatly strained, it was not in the interests of the industry that he should be reinstated or that the order of the Labour Court, which was proper in the circumstances, should be interfered with. In support of this contention, learned Counsel relied on the decision of the Supreme Court in *Punjab National Bank* v. *Their Workmen*[1], where the Supreme Court has stated the position thus:

> "It is obvious that no hard and fast rule can be laid down in dealing with this problem. Each case must be considered on its own merits, and in reaching the final decision an attempt must be made to reconcile the conflicting claims made by the employee and the employer. The employee is entitled to security of service and should be protected against wrongful dismissals, and so the normal rule would be reinstatement in such cases. Nevertheless in unusual or exceptional cases the Tribunal may have to consider whether in the interest of the industry itself, it would be desirable or expedient not to direct reinstatement."

It has been, time and again, laid down by the Supreme Court that the normal relief in the case of wrongful dismissal and retrenchment is one of reinstatement. In *Swadesamitran Ltd.* v. *Their Workmen*[2], the Supreme Court had held :

> "Once it is found that retrenchment is unjustified and improper, it is for the Tribunal below to consider to what relief the retrenched workmen are entitled. Ordinarily, if a workman has been improperly and illegally retrenched, he is entitled to claim reinstatement. The fact that in the meanwhile the employer has engaged other workmen would not necessarily defeat the claim for reinstatement of the retrenched workmen ; nor can the fact that protracted litigation in regard to the dispute has inevitably meant delay, defeat such a claim for reinstatement. This Court has consistently held that in the case of wrongful dismissal, discharge or retrenchment, a claim for reinstatement cannot be defeated merely because time has lapsed or that the employer has engaged fresh hands."

This decision negatives the plea of the learned Counsel for the Management that reinstatement should not be ordered on the ground that the employer had engaged Mohammed in the place of Krishnan and also the plea that there had been protracted litigation and delay in the matter. The Supreme Court has also held in *M.L. Bose & Company (P.) Ltd.* v. *Its Employees*[3], that the reinstatement cannot be denied on the ground that the relationship between the Management and the workmen is strained. So, the only plea that is open to the Management is that it is an unusual and exceptional case, in which it is not in the interests of the industry that reinstatement should be ordered, and that, in any event, the order of the Labour Court should not be interfered with, in the exercise of the jurisdiction of this Court under Article 226 of the Constitution. It is to be remembered that Mr. Dolia contended that this plea was not open to the Management on the ground that the order of remand was restricted to the question whether there was any delay and if there was delay whether it would disentitle Krishnan from getting the relief of reinstatement or of back-wages or of both and that the plea that Krishnan should not be reinstated and that payment of compensation would be an adequate relief was not open in the order of

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1. (1960) S.C.J. 999: (1960) 1 S.C.R. 806: (1960) 1 L.L.J. 504 at 509.
2. (1960) S.C.J. 658: (1960) 3 S.C.R. 144: (1959) 2 L.L.J. 666 at 682.
3. (1961) 2 L.L.J. 107 : A.I.R. 1961 S.C. 1198.

remand. Mr. Dolia also contended that neither in the previous proceedings nor before the Labour Court it was contended that the relief of reinstatement should not be given and that payment of compensation in lieu of reinstatement would be enough. The contention of Mr. Dolia will have to be accepted. It is also seen that the Management never pleaded that, in the event of the Labour Court finding that Krishnan would be entitled to reinstatement, he would be amply provided for by payment of compensation. Apart from this objection, I do not see how this case can be brought under the exception that is contemplated in the decision in *Punjab National Bank* v. *Their Workmen*[1]. It cannot be said that it is an unusual or exceptional case, for the reasons stated.

It was next contended by Mr. M.R. Narayanaswami, learned Counsel for the Management, that, if this Court should find that the order of the Labour Court directing payment of compensation in lieu of reinstatement is erroneous, this Court should content itself with quashing that portion of the order and remand it for further disposal to the Labour Court. I do not think this contention can be accepted, in view of the clear pronouncement of the Supreme Court, in *Dwarka Nath* v. *Income-tax Officer*[2]. Dealing with the jurisdiction of the High Court under Article 226, the Supreme Court pointed out:

> "This article (Article 226) is couched in comprehensive phraseology and it *ex facie* confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised."

The Supreme Court has also pointed out that the High Courts can issue prerogative writs and other directions or orders, which would enable the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this Country. It has further pointed out that some limitations are implicit in Article 226, for the purpose of directing the power through defined channels. The limitations envisaged would not limit the power of this Court from granting the relief which on the finding of the Labour Court P. Krishnan would be entitled to.

In the result, W.P. No. 3533 of 1965 is allowed and W.P. No. 677 of 1966 is dismissed. There will be no order as to costs in both the petitions.

This petition having been set down this day for being mentioned upon the letter of the Advocate dated 23rd June, 1967, and in the presence of the said Advocate, the Court made the following

ORDER.—The Writ Petition is allowed. The petitioner will be reinstated with back-wages as stated earlier.

V.K. *Petition No.* 3533 *of* 1965 *allowed;*
Petition No. 677 *of* 1966 *dimissed.*

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1. (1960) S.C.J. 999: (1960) 1 S.C.R. 806: (1959) 2 L.L.J. 666.
2. (1965) 2 I.T.J. 218: (1965) 2 S.C.J. 296: (1965) 57 I.T.R. 349: (1965) 3 S.C.R. 536: A.I.R. 1966 S.C. 81 at 84.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

V. Solamalayan Poojari (deceased) and others .. *Petitioners**

v.

The Commissioner, Hindu Religious and Charitable Endowments, Madras and others .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XXII of 1959), section 63 (e)—Claim to emoluments—Dispute that the person claiming emolument is not entitled to the office carrying emoluments—Right to emoluments and right to offiice inter-linked—Deputy Commissioner's jurisdiction to decide the right to office.

When section 63 (*e*) of the Act speaks of a person being entitled by custom or otherwise to an emolument in any religious institution and he seeks for relief in respect of such an emolument under section 63 (*e*) before the Deputy Commissioner and if his right to receive the emolument is disputed because it is urged by the opposite party that he is not the proper person entitled to the office which carries that emolument, it will be within the jurisdiction of the Deputy Commissioner to decide that right as a preliminary step before giving him the relief which he seeks in respect of the emoluments. In other words, when the right to the office and the right to the emoluments are both inter-linked, the Deputy Commissioner, while exercising jurisdiction regarding the right to the emoluments cannot refuse to exercise jurisdiction for deciding the right to the office which is a condition precedent to the applicant being entitled to the emoluments.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in Appeal No. 37 of 1962 before the Commissioner for Hindu Religious and Charitable Endowments, Madras, revising that of the Deputy Commissioner, Hindu Religious and Charitable Endowments, Madurai, in O.A. No. 5 of 1961 and quash the order dated 29th August, 1963 and made in Appeal No. 37 of 1962.

S. Sankararamakrishnan, for Petitioners.

J. Kanakaraj for Additional Government Pleader, for Respondents 1 and 2.

V. N. Venkatavaradachariar, for Respondents 3 to 9.

R. Sundaralingam, for Respondent 10.

The Court made the following

ORDER.—In this writ petition, the petitioner attacks the finding of the first respondent, Commissioner, Hindu Religious and Charitable Endowments, in Appeal No. 37 of 1962 filed against the order of the Deputy Commissioner, Hindu Religious and Charitable Endowments, Madurai, the second respondent in O.A. No. 5 of 1961 and prays for the issue of a writ of *certiorari* to quash the abovesaid order.

The brief facts necessary for consideration of this writ petition are the following: The petitioner was appointed by the Executive Officer of the Sri Kallalagar Koil Devasthanam, Melur Taluk, Madurai district, respondent No. 10, as poojari in one of the temples attached to the Devasthanam, on 13th June, 1941. Respondents 3 to 8 filed a claim under section 63 (*e*) of the Madras Hindu Religious and Charitable Endowments Act (XXII of 1959) before the Deputy Commissioner, Hindu Religious and Charitable Endowments stating that they were the persons who by hereditary right became entitled to the aforesaid poojariship and also to the emoluments attached to that office and they prayed for a declaration of such a right and the consequential relief of payment of emoluments. The Deputy Commissioner,

* W.P. No. 286 of 1964. 29th June, 1967.

however, declined to exercise jurisdiction on the principal ground that a declaration as to their hereditary right to succeed to the poojariship on which the respondents 3 to 8 based their relief for emoluments, was outside the purview of section 63 (*e*) and dismissed the claim. Respondents 3 to 8 took the matter in appeal under section 69 to the Commissioner for the Hindu Religious and Charitable Endowments. The Commissioner held that the decision about the right of the petitioner to succeed to the hereditary office of Poojari was necessary to enable the grant of the further relief in respect of emoluments which they sought under section 63 (*e*). The Commissioner drew a distinction in this respect between 63 (*e*) and section 63 (*b*). While the Act has provided for a special provision in section 63 (*b*) for deciding a dispute about a right to succeed to the hereditary office of trustee, the Act is silent in respect of the right to succeed to an hereditary office like that of an archaka which carries with it certain emoluments. Because there is such a distinction according to the Commissioner, the special provision in section 63 (*e*) conferring jurisdiction to decide a dispute about the right to receive emoluments was sufficient to confer also jurisdiction to decide a dispute regarding succession to the office of poojari and other employees under the religious institution to which those emoluments are attached. The Commissioner allowed the appeal and directed the Deputy Commissioner to enquire into the claim. This writ petition is filed by the petitioner, aggrieved against the abovesaid order of the Commissioner for Hindu Religious and Charitable Endowments.

The word 'emolument' has been defined in the Concise Oxford Dictionary as "'profit from office or employment, salary". It is therefore clear that when section 63 (*e*) of the Act speaks of a person being entitled by custom or otherwise to an emolument in any religious institution, and he seeks for relief in respect of such an emolument under section 63 (*e*) before the Deputy Commissioner, and if his right to receive the emolument is disputed because it is urged by the opposite party that he is not the proper person entitled to the office which carries tht emolument, it will be within the jurisdiction of the Deputy Commissioner to decide that right as a preliminary step before giving him the relief which he seeks in respect of the emoluments. In other words, when the right to the office and the right to the emoluments are both inter-linked, the Deputy Commissioner, while exercising jurisdction regarding the right to the emoluments cannot refuse to exercise jurisdiction for deciding the right to the office which is a condition precedent to the applicant being entitled to the emoluments.

It is represented before me that there is no reported decision covering this point. But the learned Counsel for the respondents 3 to 8 has referred me to an unreported decision of Krishnaswami Nayudu, J., in Second Appeal No. 1143 of 1951. That was a case where a certain person filed a suit in the civil Court for a declaration that she was entitled to Poojari rights in certain temples. The trial Court decreed the suit but the appellate Court dismissed the suit holding that the provisions of section 79 (A) of the Hindu Religious and Charitable Endowments Act (II of 1927) (as amended by Act V of 1944 and Act X of 1946) barred the jurisdiction of the civil Court. Section 79 read:

"Save as otherwise expressly provided in or under this Act nothing herein contained shall affect any established usage of a math or temple or the rights, honours, emoluments and perquisites to which any persor may by custom or otherwise be entitled in such math or temple."

Section 79-A (1) provided:

"If any dispute arises in regard to any of the matters mentioned in section 79, such dispute shall be decided by the Board."

Section 79-A (3) gave a remedy to a person affected by the order of the Board to apply to the Court within three months to modify or set aside the same, but subject to the result of such application the order of the Board shall be final. The learned Judge in the abovesaid unreported decision considered sections 79 and 79-A (1) and

section 79-A (3) and held that, that particular suit was barred in the civil Court as exclusive jurisdiction to deal with the dispute about the hereditary poojariship, was conferred on the tribunals constituted under the Hindu Religious and Charitable Endowments Act. Section 79-A was in wider terms than section 63 (*e*) of the present Act because it referred to *rights* besides honours and perquisites whereas section 63 (*e*) of Act XXII of 1959 refers only to honours, emoluments or perquisites. But both the provisions have this in common that they deal with honours, emoluments or perquisites. In the present case, there is not merely a dispute raised about the right to succeed to a hereditary office, but as already mentioned the dispute also covers the right to receive the emoluments attached to that office. In view of the abovesaid considerations, I am of opinion that the view of the Commissioner that the Deputy Commissioner had jurisdiction to entertain the claim under section 63 (*e*) is right and calls for no interference.

Learned Counsel for the petitioner urged that the respondents 3 to 8 ought to have filed a claim soon after the Devasthanam appointed the petitioner on 13th June, 1941, as Poojari, and that long delay of 20 years in filing the present claim must be considered as a bar against their getting the present relief. The plea of limitation raised in this manner cannot be dealt with in this writ proceeding. If raised, it can be considered and dealt with by the Deputy Commissioner in accordance with the relevant provisions of the Act and Rules.

The Writ Petition is dismissed with costs. Advocate's fee Rs. 150.

S.V.J. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

O. A. O. A. M. Muthiah Chettiar (died) and others .. *Petitioners**

v.

The Revenue Divisional Officer (Land Acquisition Officer), Tirukoilur, South Arcot District .. *Respondent.*

Land Acquisition Act (I of 1894), *sections* 12 (2), 18 *and* 45—*Statutory notice under section* 12 (2)—*Proper mode of service—Notice by registered post returned with the endorsement 'not found'—Not proper service—'Date of award' in section* 18—*Meaning.*

Section 18 of the Land Acquisition Act which provides for a reference to the civil Court against an award of compensation by the Collector, grants to the aggrieved person six weeks' time from the date of *receipt* of the notice from the Collector under section 12 (2). This would show that the notice to be a valid notice should not only be sent by registered post, but should also be delivered to the claimant because, without such notice there could be no *receipt.* The position is made further clear in section 45 of the Land Acquisition Act. The ordinary rule of service mentioned in section 45 is delivering or tendering a copy of the notice to the person concerned and if the person could not be found it can be served on any adult male member of the family residing with him. If no such adult male member could be found, it can be served by affixture of the notice in his house. The proviso to section 45 (3) permits the Collector to send a notice by registered post. But in that event, the factum of service should be proved by the production of the addressee's receipt. A notice sent by registered post acknowledgment due, and returned by the postal authorities, with the endorsement " not found ", would not be a valid service of notice under section 12 (2).

The ' date of the award ' for the purpose of computation of limitation under section 18 of the Land Acquisition Act should not be determined solely by

* W.P. No. 1991 of 1964. 8th August, 1967.

reference to the time when it was signed by the Collector or delivered by him in his office, but it must involve the question as to when it was known to the party concerned either actually or constructively. (Vide) *R.H.C. Raj Singh* v. *Deputy Land Acquisition Officer*, (1962) 1 S.C.J. 696 : (1962) 1 S.C.R. 676 : (1962) 2 An. W.R. (S.C.) 10 : (1962) 2 M.L.J. (S.C.) 10.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the respondent to issue notice to the petitioner under section 12 (2) of the Land Acquisition Act with reference to the acquisition of the Petitioners' lands in R.S. Nos. 11/3, 11/4 and 12 in Kumarakuppam village hamlet of Valavanur, South Arcot District.

T. Ramalingam for *T. R. Srinivasan*, for Petitioners.

J. Kanakaraj for the Government Pleader, for Respondent.

The Court made the following

ORDER.—The question for decision in this case is a brief one. The petitioner is the owner of a certain land in Valavanur village in South Arcot District, which was proposed to be acquired for the purpose of the District Board High School. It was common ground that he was one of the persons who filed their claims before the acquiring officer, as a person interested in the land. The award was passed on 31st March, 1959. The petitioner admitted that he was not present at the award. But his contention is that, as one of the persons interested in the land and who had filed a claim in respect of it, he was entitled to the statutory notice under section 12 (2) of the Act (Land Acqusisition Act), so that, if aggrieved against the award of compensation, he could apply to the Collector under section 18 of the Act within six weeks of the receipt of the notice from the Collector or within six months from the date of the Collector's award, whichever period shall first expire, for making reference to civil Court. The petitioner contended that on 27th October, 1959 he wrote to the Collector as to the stage at which the matter was and the Collector replied on 15th November, 1959 that an award had been passed on 31st March, 1959. Thereafter, the petitioner filed a writ petition in this Court, W.P. No. 76 of 1964 praying for a *mandamus*, directing the Collector to give him the statutory notice under section 12 (2) of the Act. Veeraswami, J., who disposed of the petition, observed that the petitioner should approach the Collector for necessary relief, before moving this Court, and dismissed the writ petition. The petitioner, thereafter, applied to the Collector on 19th March, 1964 praying that he might be given the statutory notice under section 12 (2). But the Collector informed him on 23rd March, 1964 that the statutory notice had already been given to him under section 12 (2). Thereupon, the petitioner has filed this petition under Article 226 of the Constitution with a request that the respondent officer (Land Acquisition Officer) might be directed by a writ of *mandamus* to give him notice under section 12 (2) of the Act.

In the counter affidavit of the respondent, it is stated that the notice under section 12 (2) of the Act was sent to the petitioner on 31st March, 1959 by registered post acknowledgment due, and that that notice was returned by the postal department, with the endorsement 'not found'. It is urged that the petitioner is not entitled to any notice under section 12 (2) for a second time in the above circumstances.

It appears to me that the contention thus raised in the counter affidavit is not sustainable. Section 12 (2) provides that the Collector shall *give* immediate notice of his award to the persons who are interested and who are not personally present at the time of the award. Section 18 which is the relevant section for making reference to Court, grants to the aggrieved person six weeks' time from the date of *receipt* of the notice from the Collector under section 12 (2). This would show that the notice to be a valid notice should not only be sent by registered post, but should also be delivered to the claimant, because, without such delivery there could be no

receipt. The position is made further clear in section 45 of the Land Acquisition Act, wherein the statute itself lays down the provisions for proper service of notices under the Act. The ordinary rule of service mentioned in section 45 is delivering or tendering a copy of the notice to the person concerned, and if the person could not be found it can be served on any adult male member of the family residing with him. If no such adult male member could be found, it can be served by affixture of the notice in his house. The proviso to section 45 (3) permits the Collector to send a notice by registered post. But in that event, the factum of service should be proved by the production of the addressee's receipt. As the petitioner was not served with the postal notice in this case, it could not be deemed to be valid service of the registered post notice, under the proviso above mentioned to section 45. The Land Acquisition Officer is obliged, for the purpose of compliance with the statute, to resort to one of the several modes mentioned in section 45, *i.e.*, either by delivery of tender or by service by affixture to the house and if any such mode of service cannot be undertaken, then by actual service of a notice sent by registered post. But such service has not been effected in this case.

For the above reasons, I am of opinion that there has been no valid service of the notice under section 12 (2) as required under the Statute, on the petitioner in this case, and the petitioner is, therefore, entitled to a writ of *mandamus* as prayed for by him directing the issue of a fresh notice under section 12 (2) in one of the methods of service provided in section 45 of the Act.

There was an argument by learned Counsel for the Government that such service cannot be of any avail for the purpose of obtaining remedy under section 18 of the Act, because the six months period from the date of the Collector's award has already expired. This argument however does not take ito account the principle laid down by the Supreme Court in *R. H. C. Raj Singh* v. *Deputy Land Acquisition Officer*[1], where, dealing with the date of the award for the purpose of computation of limitation under section 18 of the Land Acquisition Act, the Supreme Court observed that the date of the award should not be determined solely by reference to the time when it was signed by the Collector or delivered by him in his office, but it must involve the question as to when it was known to the party concerned either actually or constructively. Therefore if the petitioner can show that, notwithstanding the fact that the award in this case was passed on 31st March, 1959 he had no means to know of it either actually or constructively, it will be open to him to compute the period of limitation from the date of service of a proper notice under section 12 (2) of the Land Acquisition Act.

The writ petition is, therefore, allowed. There will be no order as to costs.

V.K. *Petition allowed.*

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1. (1962) 2 M.L.J. (S.C.) 10 : (1962) 1 S.C.R. 676: (1962) 2 An.W.R. (S.C.) 10: (1962) 1 S.C.J. 696.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. RAMAMURTI.

Chidambara Thevar .. *Appellant**

v.

T. Vedayya Thevar and others .. *Respondents.*

Customary right of pathway through cultivable land—Claim by the inhabitants of the particular locality—Requirements of such a custom—Right of public pathway to be immemorial in origin, certain, reasonable in nature and continuous in law—User as of right.

Cultivable land remaining fallow during summer—Owner permitting the user—Long enjoyment of such user—No presumption of enjoyment of right—Only presumption is user was permissive—No records to show enjoyment as of right—Even if enjoyed as of right, being unreasonable such claim of customary right is to be negatived.

Civil Procedure Code (V of 1908), section 100—Conclusion of a customary right from facts—Question of fact and law—Power of High Court to interfere in second appeal.

Through the cultivated land of the plaintiff, the defendants claimed the pathway as a public pathway and not for the inhabitants of any particular locality.

Held : It is not a case of easement either by grant or of necessity, as there is no question of dominant and servient heritage, and the right claimed is purely a personal right. Whether on the facts found the conclusion of a customary right could be drawn is a question of fact and law which can well be considered by the High Court unfettered by the restrictions of section 100, Civil Procedure Code. In order to uphold such a customary right it should be immemorial in origin, certain reasonable in nature and continuous in law and should have been enjoyed as of right (*Lakshmidhar Misra* v. *Rangalal*[1], L. R. (1949) 76 I.A. 271 : (1950) 1 M.L.J. 100 (P.C.)).

Considering the important aspect, whether the enjoyment was as of right, from the decisions of the various Courts it is clear that it is for the defendants to prove that the user was as of right. No presumption *de jure* could be raised from mere long enjoyment. All the circumstances of the case have to be taken into account. The conditions and circumstances of the case to be taken note of undoubtedly include the habits of the people in India that they do not generally object to the residents of the village using the fallow land as a pathway. The presumption in this case is that the user was permissive. In the survey record of rights and Government records also, there was no mention of the customary right of pathway over the plaintiff's land.

The claim of the defendant has to be negatived as it does not satisfy the equally important condition of reasonableness. It will be a very unreasonable custom for people to walk through lands in which the owner has raised cultivation (as in this case, paddy or tobacco), especially when there is another pathway about a few furlongs further.

In this case, judged by any test the inference of law, namely, the customary right, cannot be drawn. The pathway, if it had existed, would certainly have been mentioned in the village plan and village records and again it would have been mentioned when sales of lands near about the disputed pathways were effected. Further, the pathway that is claimed is a rambling pathway running through lands of various persons and a substantial portion runs through Government poramboke land. In such a case, unless the right of pathway is admitted by the owners of those lands a customery right cannot be upheld as it would be recognition of a precarious right. Further, the pathway has admittedly ups and downs. water course in the middle and during rainy days it is very difficult to pass through.

* S. A. No. 1059 of 1961. 13th January, 1966.

Again, during the summer when the lands are fallow people do not pass through this pathway alone, but pass through any field as they like which is fallow. Further, if the pathway had been in existence the owner of the lands who has been raising cultivation and crops on either side of the pathway would have surely put up a fence to prevent valuable crops being damaged by the people walking through and cattle. The absence of such fence is a decisive circumstance leading to the conclusion that it is only during the summer that people have been passing through fields. That emphasises that the user is not as of right but the owner acquiesces in such user because it does not harm him. During cultivation season the villagers are not allowed to pass through which means enjoyment is not as of right.

The question of a customary right being not a question of fact but essentially a question of fact and law, justifying interference in second appeal, it has to be held that the lower appellate Court had not considered the matter from a correct standpoint. The customary right not having been established by the defendants, the suit has to be decided in favour of the plaintiffs.

Appeal against the Decree of the District Court of East Thanjavur at Nagapattinam, in Appeal Suit No. 77 of 1960 preferred against the decree of the District Munsif of Tiruthuraipundi in Original Suit No. 286 of 1959.

T. R. Srinivasan, for Appellant.

K. Kalyanasundaram, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant in this second appeal, and the dispute relates to a right of pathway cutting across his land and marked in red *A B C* in exhibit A-1, the plan prepared by the commissioner who was appointed to inspect the site and submit a report with a view to have a proper and adequate appreciation of the points in controversy. The defendants, who are resisting the suit, claim the right of pathway, their case being that the residents of various villages on the west of the Government poramboke cart track marked as *G P C T* in the plan running in S. No. 49/11 have been going from the west to the Sethu Rastha on the east. The various portions of the pathway have been marked red in the commissioner's plan. Some portions of the pathway pass through Government poramboke land in which a tank exists called Ayyanar Thidal near Sannathi Road cutting Sethu Rastha. As observed earlier that portion of the pathway *A B C* which is the connecting link on either side of the pathway (between *G P C T* and Sethu Rastha) cuts across the cultivable land of the plaintiff in which tobacco crop has been raised and at the point *A B* a fence has been put up by the plaintiff which resulted in the defendants asserting their right of way through *A B C* and objecting to the plaintiff's putting up the fence. As the plaintiff would not remove the obstructions at the points *A* and *C* and restore the pathway the defendants cut the fence with the result that the plaintiff had filed the suit for a declaration of his title to the lands through which the pathway *A B C* runs and also for a permanent injunction against the defendants from interfering with the plaintiff's right to put up the fence at the point *A* and *C*.

A perusal of the written statement filed by the defendants shows that they have no precise legal basis on which the right to the pathway was claimed by them. All kinds of imaginable claims were put forward in the written statement an easement of necessity, a right based upon custom and a right of user of the disputed pathway by several villagers including the public at large as a public pathway for people, the general public, at the western end to go to the eastern end either to the Ayyanar Thidal tank or to the salt pans in the east near Sethu Rastha. It may even be mentioned at the outset that a perusal of the written statement shows that the claim is substantially on the basis of a public pathway involving a dedication to the public. I will advert to this aspect a little later.

Both the Courts below rightly came to the conclusion that the case is not a case of easement either by grant or of necessity, as there is no question of dominant and servient heritage, that the right claimed is purely a personal right. Both the Courts also rightly came to the conclusion that if at all the right of the defendants is to be upheld it could only be on the basis of a customary right coming within the principle of the decision of the Privy Council, in *Lakshmidhar Misra* v. *Rangalal*[1]. It has to be noticed that the burden of establishing this customary right is upon the defendants as they claim a right of way over the lands of someone else. The learned District Munsif, on a consideration of the evidence and in the light of the averments in the written statement, came to the conclusion that on the evidence adduced by the defendants they have totally failed to discharge the burden of establishing the customary right.

Even at the threshold I may mention that the learned District Munsif has written a very well considered judgment and in his approach to the problem for decision he has kept in mind, the correct legal principles. He has come to the conclusion that the evidence adduced on the side of the defendants worthless besides being wholly insufficient to make out the customary right. The learned District Munsif also came to the conclusion that the evidence adduced on the side of the defendants did not satisfy any of the conditions *ancient, continuous, peaceable, reasonable and certain*, and that above all the essential test that the enjoyment during the period in question should be *as of right* had not been made out. He took the important fact into account that in the village plan or revenue records there is no reference to this pathway and that there is equally no reference to the same in the sale deeds of adjacent lands or adjacent houses. The defendants did not adduce any such evidence and no survey plan or any sale deed has been produced before the learned District Munsif. He also took into account the fact that the pathway claimed by the defendants is a rambling one cutting across several cultivable lands, that the pathway is not uniform and that in several places the pathway is running up and down, the difference in level being about 3 feet and that during the rainy season several portions of the pathway including the portion marked *A B C* would be completely submerged under water, and people will be using the lands round about indiscriminately and that on the whole the evidence at the most merely established that such user as there was only of a sporadic nature during the fallow season as the owners do not object to people passing through when there was no cultivation in the lands. He also found that several witnesses on the defendant's side have admitted the existence of another pathway (to which fact the commissioner has also made pointed reference in his report) through which the people in the west near *G P C T* can go to the Sethu Rastha, though that pathway as admitted by D.W. 3 is a little distant for people of Kanakan Kadu. In fact D.W. 2 has also admitted that there is another pathway about three furlongs north of the suit pathway. The ultimate findings of the learned District Munsif are contained in paragraph 31 of his judgment and they show that having regard to the various extraordinary features of the pathway referred to above the District Munsif was clearly of the opinion that a pathway of the description as claimed by the defendants cannot be upheld on the basis of a customary right as it is very unreasonable, and that there was no justification for upholding that claim to cut across the lands on which the plaintiff has raised some cultivation, especially when there is another pathway serving the same purpose near about the disputed one. On appeal the learned District Judge while accepting the findings of the trial Court that the defendants had not made out a case of easement by grant or of necessity held that the defendants had made out the right based upon custom and dismissed the plaintiff's suit.

On a careful consideration of all the aspects of the matter I have reached the conclusion that the decision reached by the learned District Judge cannot be sustained. I am satisfied that the perspective of approach by the learned Judge in considering whether on the evidence a customery right could be upheld is erroneous; he has altogether overlooked the fact whether the test of enjoyment as of right has

1. (1949) L.R. 76 I.A. 271: (1950) 1 M.L.J. 100 (P.C.).

been satisfied in the instant case. He has also failed to bear in mind the other incidence which have got to be established before a customary right could be upheld. Here again he has not given consideration to the aspect that the right claimed is unreasonable, which aspect the learned District Munsif has dealt with at length. If one may say so the matter has been dealt with in a light-hearted fashion by the learned District Judge and he has not kept in mind the heavy burden which is cast upon the defendants in establishing the right to pathway in dispute especially when there is another pathway though one or two furlongs away. He seems to be of the opinion that for villagers a distance of one or two furlongs is a great thing and that they should be allowed to have the particular pathway merely because the commissioner has noted the existence of a pathway. It must be noticed that the learned District Judge has failed to appreciate that the existence of a pathway cannot be a decisive factors when during the fallow season the land is dry and people pass through more as a case of licence than as of right, and the question has therefore, to be decided not on the mere appearance of a pathway put upon the evidence of user that has been adduced. I am clear in my mind that the evidence adduced on the side of the defendants is useless and wholly insufficient and does not satisfy the requirements of law for upholding the claim based upon a custom, *i.e.*, a customary right.

It may be convenient at this stage to refer to the decision of the Privy Council *Lakshmidhar Misra* v. *Rangalal*[1], which contains a discussion of the essential features and incidents of a customary right and when such a customary right could be upheld. The dispute in that case related to the right of the inhabitants of a particular village to use a certain extent of land near the Bengal-Nagpur Railway line as a burial ground which claim was resisted by the other side who wanted to use the site for the purposes of a rice mill. The trial Court negatived the claim of the villagers based upon the theory of dedication and lost grant as it was admittedly not in favour of the public at large. The claim based upon an easement or prescriptive right was also found against as not being pressed. The claim as one of the customary right was negatived by the trial Court as it thought that the evidence was insufficient to establish the existence of such right. The Subordinate Judge on appeal came to a contrary conclusion in the view that the facts established the reservation of the land as a burial ground amounting to a dedication. The plaintiff's claim based upon a customary right was rejected. In Second Appeal the High Court came to the conclusion which was against the plaintiffs on the question of dedication and dismissed the appeal, with the result that the plaintiffs failed both on the 'question of dedication as well as on the basis of a customary right. On appeal by the plaintiffs to the Privy Council the appellants' claim was upheld only on the basis of a customary right. The Privy Council found that on the evidence it was clear that from time immemorial, generation after generation, the inhabitants of the particular village have been using the disputed land as a cremation ground as of right. It is pertinent to mention that when some argument was advanced based upon section 100, Civil Procedure Code, on the question that the findings of the Courts below constituted findings of fact binding upon the High Court, the Privy Council observed that the question whether a custom is to be recognised or not was essentially a mixed question of fact and law and that whether a customary right could be recognised or not, is a question of law although the facts upon which the question has to be decided cannot be a matter of appeal beyond the first appellate Court. In other words, it is clear from this decision that the question as to whether on the facts found the conclusion of a customary right could be drawn is a question of law which can well be considered by this Court unfettered by the restrictions of section 100. The Privy Council has pointed out that in order to uphold such a custom, a right should be immemorial in origin certain, reasonable in nature, and continuous in law and should have been enjoyed as of right.

1. (1949) L.R. 76 I.A. 271 : (1950) 1 M.L.J. 100 (P.C.).

The question in the instant case is whether on the facts it could be held that the defendants had made out all these essential requirements of such a customary right. My attention was drawn to some of the cases in which some of these incidents, *reasonableness, enjoyment as of right, the nature of the presumption to be drawn from proof of the enjoyment of the particular right for a period of years, whether, it was as of right or by leave and licence* came up for consideration. In the case of acquisition by prescription of a right of easement, a right of way under section 15 of the Easements Act the enjoyment must be as of right, and so cases which have dealt with the scope of section 15, acquisition of the right of easement by prescription of a right of way will be relevant in considering the question of a customary right, where also the enjoyment amongst other things must be equally as of right. As observed earlier the written statement (vide paragraph 4) raised all conceivable pleas, an easement by prescription, an easement of necessity, and a customary right. One thing, however, is clear that the defendants claimed the pathway as a public pathway and not for the inhabitants of any particular locality, and while determining how far the defendants have made out the customary right as restricting the same to the inhabitants of a particular village the principle of the decision in *Lakshmidhar Misra* v. *Rangalal*[1], will have to be borne in mind.

I shall first consider the important aspect, namely, whether the enjoyment was as of right. The learned District Judge does not appear to have been alive to this crucial aspect. In paragraph 14 he refers to the oral evidence on the side of the defendants, regarding the period during which the pathway was used. I will deal with this evidence when I consider the question as to whether that evidence establishes that the customary right is ancient and immemorial. So far as this question *as of right* is concerned, there is no discussion of any kind whatsoever except a single sentence in paragraph 19 where again the learned Judge deals with a different aspect altogether, *i.e.*, whether the defendants' pleading or the evidence was pathway in favour of the public in general or a pathway for the inhabitants of the locality. Except this single isolated sentence *from the entire evidence it is clear that people of that locality alone used the pathway as of right* there is no other reference or discussion anywhere in the judgment. D.W. 2 is the first defendant in this case and this obviously interested testimony is referred to by the learned District Munsif to show that the same cannot be accepted. That apart in the context in which that sentence occurs in paragraph 19, I am clear in my mind that the learned District Judge is referring to this evidence only to emphasise that the pathway is used by the people of the locality and not by the public in general. The next sentence *the mere occasional user of the pathway by the public would not necessarily negative the customary rights* in the same paragraph emphasises the the same aspect whether the pathway is a public pathway or limited in its kind. The result is there is no discussion of the evidence and there is no finding by the lower appellate Court to be taken note of under section 100, Civil Procedure Code.

In the case of a pathway over a piece of waste land the note of caution indicated in the early case, *Shaikh Kohoda Buksh* v. *Shaikh Tajudin*[2], by Banerjee, J., has been followed in all the cases in India. The learned Judge in that case had adverted to the vital difference about conditions existing in England and in India and that in any event a presumption of user as of right could be drawn in England if the right had been enjoyed for a fairly long period while in India such a presumption merely from enjoyment could not be drawn as people in India temperamentally by habit do not object to the villagers going across their waste land as a pathway.

Reference may first be made to the decision in *Saminatha Mudaly* v. *Velu Mudaly*[3], in which it was held that from a long and uninterrupted user for a long series of years the law will presume that the user has been as of right. That decision dealt with a case of a right of certain persons to take water from the tank situated in the

1. (1949) L.R. 76 I.A. 271: (1950) M.L.J. 100 (P. C.).
2. (1903) 8 C.W.N. 359.
3. (1916) 4 L.W. 128.

land of another person, which right was exercised spreading over a long number of years, 60 to 80. The decision in *Shaikha Khoda Buksh* v. *Shaikh Tajudin*[1], was distinguished on the ground of the vital distinction between a right of way over a waste land and a right to take water in a tank situated in another's land which in this country is regarded very valuable. In the case of a right of way one can presume that it would have been with leave and licence, and not as of right but that in the case of a right to take water there cannot be a presumption of leave and licence, and that long user would invariably give rise to a presumption of user as of right. The significance of the observations at page 132 is that from mere user alone a presumption of user as of right could not be drawn regardless of particular nature of the right and other circumstances of the case.

I may next refer to the Bench decision in *Kunjammal* v. *Rathinam Pillai*[2], in which the presumption that the user was as of right was drawn on the finding that the plaintiff had proved that his scavenger was cleaning his privy for over thirty years by passing through the defendant's house. That decision dealt with the case of an acquisition of a right of easement under section 15 of the Easements Act which provides that in the case of a right of way enjoyment should be as of right for the requisite period. Here again the observations of Banarjee, J., in *Shaikh Khoda Buksh* v. *Shaikh Tajudin*[1], that in the case of a right of way there will be no presumption by mere proof of enjoyment for a particular period and that the plaintiff must establish that the user was as of right and that the inference to be drawn would depend upon the nature and character of the land, the friendship or relationship between the parties and such other considerations, were referred to. The decision of the Calcutta High Court was distinguished and the principle enunciated in *Saminatha Mudaly* v. *Velu Mudaly*[3], referred to earlier was followed, in the view that normally persons would not allow scavengers to pass through their house and if that happened for a number of years, it would not have been with leave and licence but would have been only as of right. This decision shows that no presumption *de jure* could be raised from mere long enjoyment and that all the circumstances of the case should be taken into account and in particular, the particular right that is asserted. The conditions and circumstances of the case to be taken note of undoubtedly include the habits of the people in this country that they do not generally object to the residents of the village using a waste land as a pathway when the land is not valuable.

In *Nasiruddin* v. *Deokali*[4], this aspect that the burden is upon the plaintiff to plead and prove that the user must be as of right was emphasised with particular reference to the law in England and in India. Courtney-Terrell, C.J., stated thus at pages 125-126:

"In English law the exercise of a right of way and similar positive easements for a prolonged period gives rise to the presumption that such exercise was 'of right', that is to say, it is presumed that the right of passage was exercised without any permission, express or implied, on the part of the owner of the servient tenament. This is because social conditions and the nature of the landed property in England are such that landowners are particularly jealous of their exclusive right and the familiar appearance of the notice boards to be seen in England bearing the inscription " trespassers will be prosecuted" is an indication of the views held by the owners of property. Accordingly, it is to be presumed that if the owner of the dominant tenement has for a long period passed over the servient tenement that he did it from the beginning with a claim of right, for it is unlikely that if he had such a right that the owner of the servient tenement would have allowed him to pass. In India, however, and it may be in other countries where such views of the exclusiveness of landed property do not prevail a mere period of long user will not give rise to the presumption. It is customary for the owner of a piece of waste land not to raise any objection to the passage of strangers over such land.

1. (1903) 8 C. W. N. 359.
2. (1921) I. L. R. 45 Mad. 633: (1922) 42 M. L. J. 417.
3. (1916) 4 L. W. 128.
4. A. I. R. 1929 Pat. 124.

It was pointed out by the Calcutta High Court in the leading case of *Shaikh Khoda Buksh* v. *Shaikh Tajudin*[1], that in such circumstances mere long user gives rise to no such presumption as is to be inferred in England and that whether or not long user creates the presumption that its beginning was founded on a claim of right will depend upon the locality, the customs of the people and it may be, the relationship between the respective owners of the dominent and servient tenements."

This view was followed in *Lambodar* v. *Ramesh Chandra*[2]. In that case the plaintiffs sought a declaration of a right of pathway over the fallow lands of the defendants relying upon the user for more than thirty years. The District Munsif dismissed the suit holding that the plaintiffs had not proved user as of right. But on appeal this view was reversed by the Subordinate Judge and the plaintiff's suit was decreed. The High Court reversed the decision and restored that of the District Munsif, dismissing the plaintiff's suit in the view that the decision of the Subordinate Judge was contrary to law and that he did not appreciate correctly the principle laid down in the several cases with regard to the inference to be drawn from long user in the case of a right of way over a vacant land. The learned Judge observed that in India if a land lies fallow people generally have a weakness to resort to a short cut to a particular place using the vacant land as a pathway, and that the owner does not generally object and the user is really due to leave and licence and not as of right. From this decision it is clear that a person claiming a right of way should prove that the user was as of right, and that he could prove that by showing that at some time there was obstruction but nevertheless he continued to use ; and that generally in the case of a right of way according to the conditions in India the relationship of the parties and the circumstances of the case, the presumption is that the user is permissive. I may next refer to the Bench decision of the Patna High Court in *Salina Jitendra Lal* v. *Ram Charan*[3], in which it was held that it was wrong to say that merely because there was no cultivation of the disputed land there was a presumption either in law or in fact that the user of a pathway over the land was more of right and because of the special circumstances prevalent in India, mere user for a long period of property will not give rise to the presumption that the claim as a user was as a matter of right. In that case the District Munsif dismissed the suit holding that the plaintiff had not proved that the user of the pathway was as of right. But the lower appellate Court came to a contrary conclusion. The High Court reversed this decision and restored that of the trial Court in the view that the perspective of approach of the lower appellate Court was erroneous in law calling for interference in second appeal. The lower appellate Court in that case while upholding the right of pathway observed as follows :

" In my opinon the proof of non-interference as shown by the plaintiffs evidence is proof of the fact in this case that the user was as of right and non-interference cannot be considered to be mere granting of permission as has been held by the Munsif. The non-interference not only amounted to a permission but also amounted to non-exercise of a right that the owner had of cultivation.

This reasoning was considered by the High Court to be perverse as it proceeded upon an erroneous understanding of the law laid down in the relevant decisions. In that case too an important circumstance which the lower appellate Court failed to notice in reaching the finding (as in the instant case) was that in the survey record of rights and Government records there was no mention of the customary right of pathway over the disputed land. This decision followed the decision of the Privy Council in *Lakshmidhar Misra* v. *Rangalal*[4], and held that the question of a customary right is not a question of fact but is essentially a mixed question of fact and law, justifying interference in second appeal, if the matter is not considered by the lower appellate Court from a correct standpoint.

My attention was also drawn to the Bench decision in *Ramachandra* v. *Hari*[5], in which it was emphasised that the burden of proving that the enjoyment was as

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1. (1903) 8 C.W.N. 359.
2. A.I.R. 1958 Orissa 248.
3. A.I.R. 1959 Pat. 475.
4. L.R. (1949) 76 I.A. 271 : (1950) 1 M.L.J. 100 (P.C.).
5. A.I.R. 1929 Bom. 144.

of right is upon the plaintiff and that in questions regarding a right of way the Court should consider the character of the land, the relations between the parties and the circumstances under which the user took place to decide whether the user was as of right. In other words this decision emphasises that from mere user no ready reference that it was as of right should be drawn. The point of importance to notice in this decision is that when the plaintiff claims a pathway from one place to another passing through the lands of other people the presence of the owners of the intermediate land would be necessary to establish the right of way. The fact that the land in question was not put to use throughout the year but only during intervals, and that the cattle were not using the pathway during rainy season and that there was also another route, indicated that the user was not as of right.

Mr. T. R. Srinivasan, learned Counsel for the appellant, has relied upon the Bench decision in *G. Rai* v. *G. Devi*[1], in which again the same view was taken that the mere user of a piece of waste land as a passage does not give rise to a presumption in law that the claim as to user was a matter of right. The next decision to which reference must be made is the decision in *Tukaram* v. *Sonba*[2], in which again it was observed that having regard to the habits of the people of this country, it would not be right to draw the same inference from mere user that it was as of right. This case dealt with a case of a right of way and at page 65 the decision in *Kunjammal* v. *Rathinam Pillai*[3], was distinguished on the ground that considerations which apply to a right for a scavenger to pass through another house would not apply to a mere right of way over the waste land, that in the former case the presumption migh well be drawn that the user was as of right while no such presumption could be lightly drawn in the latter case. As a customary right there is no pleading even in the written statement in this case that the pathway was used as of right which shows that this aspect was not present in the mind of the defendants at that stage. On the question of actual user the learned District Judge had made a very short work and has neither considered nor adverted to the criticism of the learned District Munsif who saw these witnesses and observed their demeanour and who ultimately rejected their evidence as worthless. It is a very unsatisfactory way of disposal, hardly fair to the learned District Munsif or to the litigants concerned, especially when it is a reversing judgment.

(After discussing the fact of the case His Lordship proceeded as follows :)

Further a reading of the evidence of D.Ws. 5, 6 and 7 assuming what they say is true shows it is wholly insufficient in law to make out an ancient, immemorial, user and user as of right. For all these reasons, I find it impossible to accept the view taken by the learned District Judge. He has totally failed to keep in mind that in such cases it is of great significance for the Court to consider and apply its mind to the quality and the quantity of the evidence in particular.

I am also of the opinion that the claim of the defendants has to be negatived as it does not satisfy the equally important condition of reasonableness. It will be a very unreasonable custom for people to walk through lands in which the owner has raised cultivation as in this case, paddy or tobacco, especially when there is another pathway about a few furlongs further. In a village connecting two places which are of a distance of two to three miles, for the villagers, a distance of three or four furlongs is certainly not a great thing, and when there is such a pathway it is not reasonable to allow them to have the suit-pathway, because the distance is reduced by a few furlongs. On this aspect my attention was drawn to the decision of Umamaheswaram, J., in *Venkadu* v. *Subramaiah*[4], in which the learned Judge has observed that a custom to pass over cultivable lands is certainly unreasonable and cannot be recognised by the Courts. The learned Judge has followed the decision of the Patna High Court in *Baldeo Bind* v. *Abdul Aziz*[5], in which it was held that

1. A.I.R. 1960 Pat. 498.
2. A.I.R. 1959 Bom. 63.
3. I.L.R. (1921) 45 Mad. 633 : (1922) 42 M.L.J. 417.
4. (1954) 2 M.L.J. (Andh.) 83 : A.I.R. 1954 Andh. 54.
5. A.I.R. 1948 Pat. 425.

a customary right to pass through land bearing valuable crops should fail on the ground that the custom was unreasonable. The Bench decision in *Baldeo Bind* v. *Abdul Aziz*[1], is important in that there also the right of way was claimed more as an easement, as in this case, than as a customary right, and that it is for the party claiming the right to establish that in spite of indications of commons ense to the contrary it is reasonable for large body of men to pass through agricultural lands belonging to another and in which the owner at considerable cost, energy and expense has raised valuable crops.

Learned Counsel for the respondents drew my attention to some of the cases, *Palaniandi Thevan* v. *Puthirangonda Nadan*[2], in support of his contention that to establish ancient, immemorial user, enjoyment for no particular period is necessary and that even user for twenty years is sufficient. It is unnecessary to refer to those cases as the inference of ancient, immemorial user has to be drawn from the particular facts of each case.

Learned Counsel for the respondents placed considerable reliance upon the Bench decision of this Court in *Ratanchand Chordia* v. *Kasim Khaleeli*[3], a case arising under section 15 of the Easements Act in which it was observed that while there are no infallible tests, it would not be improper for any Court to draw the inference from long user as such that it was rather as of right than not. The observations in that judgment will have to be understood in the context of the particular right which was claimed as an easement in that case. The dispute there related to a right of way across a building, and having regard to the particula r right the case would clearly come under the principle of *Saminatha Mudaly* v. *Velu Mudaly*[4], and *Kunjammal* v. *Rathinam Pillai*[5], in which, as observed earlier, the distinction is drawn between a mere right of way over waste land and other rights which are regarded as valuable and if user is proved in the later type of cases a presumption of user as of right may well be drawn. This Bench decision, in my opinion, is not authority for the position that regardless of all considerations the nature of the right, the relationship between the parties and the surrounding circumstances of the case, an inference of user as of right should be drawn from mere enjoyment for a particular period.

In this case I have no doubt whatsoever that judged by any test the inference of law, namely, the customary right, cannot be drawn. The pathway, if it had existed,would certainly have been mentioned in the village plan and village records and again it would have been mentioned when sales of lands near about the disputed pathway were effected. Further the pathway that is claimed is a rambling pathway running through lands of various persons and a substantial portion runs through Government poramboke land. In such a case unless the right of pathway is admitted by the owners of those lands a customary right cannot be upheld as it would be recognition of a precarious right. Further the pathway has admittedly ups and downs, water courses in the middle and during rainy days it is very difficult to pass through. Again, during the summer days when the lands are fallow people do not pass through this pathway alone, but pass through any field as they like which is fallow. This is a matter of admission. Further, if the pathway had been in existence the owner of the lands who has been raising cultivation and crops on either side of the pathway would have surely put up a fence to prevent valuable crops being damaged by the people walking through and cattle. The absence of any such fence, in my opinion, is a decisive circumstance leading to the conclusion that it is only during the summer that people have been passing through fields. That emphasises that the user is not as of right but the owner acquiesces in such user because it does him no harm. During cultivation season the villagers are not allowed to pass through which means enjoyment is not as of right.

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1. A.I.R. 1948 Pat. 425.
2. I.L.R. (1897) 20 Mad. 389.
3. I.L.R. (1964) 1 Mad. 979.
4. (1916) 4 L.W. 128.
5. (1922) 42 M.L.J. 417: I.L.R. (1921) 45 Mad. 633.

For all reasons I have no hesitation in agreeing with the view taken by the learned District Munsif. The decision of the District Judge is accordingly set aside. The plaintiff's suit is decreed as prayed for. The parties shall bear their own costs. Leave refused.

V.M.K. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE M. NATESAN.

A. Krishnaswami Raja .. *Appellant**

v.

Krishna Raja and another .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), *section* 57 (b)—*Hereditary trustee—Rival claimants—Jurisdiction of Deputy Commissioner to decide.*

The jurisdiction of the Deputy Commissioner under section 57 (*b*) is confined to a decision whether a trustee holds or held office as a hereditary trustee. In other words, the Deputy Commissioner can only decide as to the status of the office of the trusteeship, namely, whether it is hereditary. He is not competent to go into the further question as to which of the competing claimants is a hereditary trustee or whether both are joint hereditary trustees. That is a matter not covered by section 57 of the Act and has to be decided only by a separate suit.

Appeal against the Decree of the Subordinate Judge, Nagapattinam, dated 27th February, 1961, in Original Suit No. 6 of 1961.

T. R. Srinivasan, S. Ramaswamy Ayyangar and *V. R. Rajagopalan,* for Appellant.

The Government Pleader (*A. Alagiriswami*), *K. S. Naidu* and *R. Vijayan,* for Respondents.

The Judgment of the Court was delivered by

Veeraswami, J.—We are of the view that this appeal by the plaintiffs has to be allowed on a short ground which will presently appear. The appellant filed an application under section 57 (*b*) of Madras Act XIX of 1951 before the Deputy Commissioner for Hindu Religious and Charitable Endowments. He held that the appellant was the sole hereditary trustee of Sri Ramaswamy Perumal Temple at Karimbiyul village in Tiruthuraipundi taluk. The first respondent appealed to the Commissioner (second respondent) against that order and claimed that he was a joint hereditary trustee which was denied by the plaintiff. The Commissioner accepted his claim and allowed the appeal. This was followed by the present suit under section 62 of the Act.

It is common ground that the office of trusteeship in the temple is hereditary. The controversy centres round the competing claims of the appellant and the first respondent. The appellant would say that he is the sole hereditary trustee but according to the first respondent, he is a joint hereditary trustee. On the view we have taken, we do not propose to go into the merits of the rival claims.

The jurisdiction of the Deputy Commissioner under section 57 (*b*) is confined to a decision whether a trustee holds or held office as a hereditary trustee. In other words, the Deputy Commissioner can only decide as to the status of the office of the trusteeship, namely, whether it is hereditary. He is not competent to go into the further question as to which of the competing claimants is a hereditary trustee or whether both are joint hereditary trustees. That is a matter not covered by section 57 of the Act and has to be decided only by a separate suit.

On that short ground, we allow this appeal. The result, is, the finding of both the Commissioner and the learned Subordinate Judge on the rival claims of the

* Appeal Suit No. 605 of 1961. 12th April 1966.

appellant and the first respondent is discharged and that question is left open. The decree is, therefore, set aside. The effect of this litigation is only to recognise that the office of the trusteeship is hereditary and nothing more. The appellant and the first respondent will bear their costs. The costs of the second respondent will come out of the estate as per the provision of the Act.

S. V. J. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. S. KAILASAM.

S. H. Joseph Thabaraj .. *Petitioner**

v.

The Principal, Government Arts College, Mount Road, Madras .. *Respondent.*

Public Institution—Expulsion of student—Power exercised by Principal or College Council, quasi-judicial—Principles of natural justice—Right of student to—Authority exercising such power to give opportunity to student—Failure to give—Effect of—Order of dismissal by Principal—Reasons not given — Whether bad.

University Regulation, Chapter 39, *Rule* 4*—Principal to send transfer certificate to Syndicate under Regulation—Principal despatching transfer certificate to parent—Not in accordance with regulation.*

The Government Arts College, which is run by the Government with public funds and governed by the Madras Educational Rules and the Disciplinary Regulations issued by the University, is a public institution and the Principal is holding a quasi-judicial office bound to discharge his duties in accordance with the rules.

The requirement that the authority should act judicially can be inferred from the nature of the decision which the tribunal has to come to. In the case of a Principal or a College Council which conducts an enquiry for the purpose of dismissing a student, apart from the authority in *University of Madras* v. *Nagalingam*, I.L.R. (1964) 1 Mad. 582 : (1964) 2 M.L.J. 251 and *Board of High School* v. *Ghanshyam*, (1963) 2 S.C.J. 509 : A.I.R. 1962 S.C. 1110, there can be no doubt that the duties of a Principal in dismissing a student fall within the rule laid down in *Ridge* v. *Baldwin*, 1964 A.C. 40 and *A.C. Companies* v. *P.N. Sharma*, (1966) 1 S.C.J. 786 : (1965) 2 S.C.R. 366 : A.I.R. 1965 S.C. 1595 and he is bound to observe principles of natural justice. It is difficult to define natural justice. The foremost principles of natural justice are (*i*) that a man cannot be judge in his own cause, and (*ii*) *audi alteram partem*, which means, that both sides of a case must be heard, before it can be decided. It has been held that no person could be damnified without being informed of the charge against him or being given an opportunity of rebutting it. The procedure that has to be adopted in guaranteeing this right of informing the person of the charge against him and giving him an opportunity of rebutting it will depend upon the nature of the tribunal. The right to examination and cross-examination which are taken for granted in most legal conflicts is not always a necessary requirement of natural justice before all tribunals. The right to be heard may be satisfactorily complied with, in the case of certain tribunals by receiving explanatory statements. It has also been held that a personal hearing is not a requisite in complying with the rule of the right to be heard. When the Principal of a College or the College Council acts as a quasi-judicial Tribunal, one may normally expect the Principal to contact the student and apprise him of the allegations against him and ask him as to what he has got to say on the charges. A reasonable opportunity should be given to the student to prove his innocence. What is reasonable opportunity would depend upon the facts of each case.

*W.P. Nos. 2203 and 2204 of 1966. 13th October, 1966.

The principles of natural justice have not been extended to include a right to require a quasi-judicial Tribunal to give reasons for its order though in some cases where the order of the Tribunal is subject to appeal, reasons are required to be given. It cannot be said that the decisions of the Supreme Court which hold that reasons should be given would cover tribunals in the nature of principals of educational institutions. As far as the Principal of a college is concerned, an order of dismissal is not necessarily bad on the ground that no reasons are given.

Held on facts, it cannot be said that there was any violation of the principles of natural justice. The Principal did read the complaints to the petitioner and asked him for his explanation and directed the guardian to meet him but the petitioner did not avail himself of that opportunity. But there is some uncertainty as to whether the Principal himself took the decision to expel the petitioner or whether the College Council was responsible for taking the decision. The petitioner has got a right to be heard by the authority that expelled him. As a reasonable doubt is created as to whether it was the Principal or the College Council that took the decision, it has become incumbent on this Court to set aside the order of dismissal. If the order of dismissal was by the College Council, it cannot be sustained, as the petitioner had no opportunity to explain his case before the College Council.

The issuing of the transfer certificate is not in accordance with the University Regulations, Chapter 39, rule 4. Neither the Principal nor the College Council was in order in sending the transfer certificate and conduct certificate to the mother of the petitioner. While the Principal has power to expel a student, he is required to send intimation of the fact of expulsion and the statement of reasons accompanied by the transfer certificate of the student, to the Syndicate. It is the duty of the Syndicate on the application of the student, or his parent, to deliver it to him after making an enquiry with the necessary endorsement. The despatch of the transfer certificate to the petitioner's mother is, therefore, not in accordance with the University Regulation and will, therefore, be withdrawn.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records pertaining to the grant of transfer certificate of the petitioner herein and quash R. C. No. 23/E/66, dated 16th August, 1966, confirming the order R.C. No. 23/E/66, dated 8th August, 1966, passed by the respondent herein and to issue a writ of *mandamus* directing the respondent to take the petitioner as the student in the first year B.A. class of the Government Arts College, Madras, for purpose of prosecuting his studies.

P. R. Gokulakrishnan, for Petitioner.

T. Selvaraj, for Government Pleader (*G. Ramanujam*), for Respondent.

The Court made the following

ORDER.—Writ Petition No. 2203 of 1966 is filed by a student in the first year of the B.A. class of the Government Arts College, Madras, for the issue of a writ of *certiorari* to the Principal of the Government Arts College calling upon him to produce the records pertaining to the grant of transfer certificate and conduct certificate of the petitioner and to quash the order, dated 16th August, 1966, confirming his earlier order, dated 8th August, 1966.

Writ Petition No. 2204 of 1966, is filed by the same student for the issue of a writ of *mandamus* directing the Principal of the Government Arts College to take in the petitioner as the student in the first year B.A. class of the Government Arts College, Madras.

The petitioner joined the first year B.A. Literature at Government Arts College, Madras, in June, 1966. He continued in the college till 9th August, 1966, when he was suspended by the Principal. As there is divergence between the parties regard-

ing as to what happened, the facts as stated by the parties in their respective affidavits will be referred to. The version of the petitioner is as follows. On 9th August, 1966, at about 3-30 P.M. when the petitioner was attending the major poetry class, on receipt of a note from the Principal, the lecturer called the petitioner and stated that the Principal wanted to see him. The petitioner met the Principal immediately. On seeing him the Principal stated that the petitioner was behaving in an indisciplined way in the college compound and called him a rogue. The petitioner requested the Principal to give him an opportunity to explain the matters and asked for the actual charges against him. The Principal got angry and refused to give any charges and said to the petitioner that he was suspended. The petitioner pleaded innocence. The Principal suggested that the petitioner might take the transfer certificate immediately, otherwise a complaint would be lodged against him for misbehaviour within the college compound. The petitioner begged the Principal to hold an enquiry pleading that he was innocent and that the allegations were unfounded. The Principal asked the petitioner to get out of the room. On 10th August, 1966, the Principal's peon handed over the suspension order, dated 8th August, 1966. The suspension order stated that the petitioner and another were suspended from 9th August, 1966, in connection with their indiscipline in the college and that they should meet the Principal with their parents or guardians. A copy of his order was sent to the mother of the petitioner, Mrs. Ruth Henry. As she was sick, the brother of the petitioner, S. D. J. Pandian, met the Principal on 16th August, 1966, but the Principal without assigning any reasons asked him to take the petitioner out of the college by getting the transfer certificate, failing which the Principal would write adverse remarks in the transfer certificate. Though the petitioner's brother prayed for an opportunity to explain the matter and answer the charges, the Principal did not accede to his request. On 16th August, 1966, the Principal sent a letter to the petitioner's mother enclosing the conduct and transfer certificates of the petitioner and informing that the College Council met on the 16th August, 1966, and decided to issue the transfer and conduct certificates to the petitioner. This letter was received on 19th August, 1966, by the petitioner's mother.

The petitioner's submission is that he is innocent and that he was victimised without giving him an opportunity of being heard. The whole scheme, according to the petitioner, was sponsored by Mr. Muthukannappar, the head of the department of Tamil, who is ill-disposed towards him due to personal animosity and political leaning. It was further alleged that the Principal actively supported Mr. Muthukannappar and became a victim of the scheme of Mr. Muthukannappar and thereby acted with *mala fide* intentions to send the petitioner out of the college.

The version as given by the Principal may now be stated. On 6th August, 1966, Sri B. S. Govindarajan, Assistant Professor of Tamil and Senior N.C.C. Officer in Government Arts College, Madras, reported in writing to the Professor of Tamil, who is also the convenor of the disciplinary committee, that the petitioner threatened another student by name D. Nandagopal of the second B.Sc. class saying that the petitioner would not hesitate to endanger the life of Sri D. Nandagopal and Sri B. S. Govindarajan. Along with this report Sri B. S. Govindarajan forwarded two written complaints received by him from Nandagopal and also the peon of the N.C.C. group of the college, to the convenor of the disciplinary committee, who submitted the same to the Principal. On 8th August, 1966, the Principal received a complaint from Sri N. C. Danapal Naidu, father of Sri D. Nandagopal, alleging that his son was manhandled on 1st August, 1966, by the petitioner who again threatened his son with knife on 5th August, 1966. In the affidavit it is stated that the Principal called the petitioner as well as another student, who was implicated in the complaints, on 9th August, 1966. At the Bar it is stated that the date 9th August, 1966, is a mistake for 8th August, 1966. It is now the common case that the Principal met the petitioner and the other student on 8th August, 1966. The Principal enquired the students about the complaints showing them the complaints received by him. While the other student was evasive in his answers, the petitioner

behaved in a manner unbecoming of a student. The Principal, therefore, told the petitioner and the other student that he was placing them under suspension for indiscipline and that they might come along with their parents and meet him. He also issued a memorandum to this effect to the petitioner and the other student and sent copies of the memorandum to their parents by registered post. The other student came with his father and expressed his regret, and he was excused and further action against him was dropped. So far as the petitioner is concerned, it is stated by the Principal that neither the petitioner nor his parents nor his guardian turned up at any time. In the meantime the Principal also had reports that the petitioner was indulging in undesirable activities and taking a prominent part in organising a strike. As neither the petitioner nor his parents or guardian turned up, the Principal placed the entire matter before the College Council on 16th August, 1966, for taking such action as the council might deem fit. The College Council consisting of gazetted officers and heads of departments, which met on 16th August, 1966, decided to issue transfer and conduct certificates to the petitioner, as they felt the continuance of the petitioner was not at all conducive to the discipline and morale of the college.

In a supplementary counter-affidavit by the Principal, the Principal stated that the College Council is usually consulted before taking any major decision affecting the students and in all matters connected with the college, but the views of the council are only recommendatory and not mandatory. The Principal explained that the matter was placed before the College Council to ascertain their views as is the usual practice in every college, and the council unanimously agreed with his view that the petitioner should be expelled and that the final decision to expel the petitioner was taken only by the Principal. The Principal reiterating that the decision was taken by him stated that, if any impression was created in the affidavit or correspondence that the decision to expel the petitioner was taken solely by the College Council, it is not correct. The Principal further stated that S.D.J. Pandian, the brother of the petitioner, met him with letter from the petitioner, dated 23rd August, 1966, and requsted him to return the P.U.C. grade certificate of the petitioner, which was done. The Principal denied the allegation that Pandian met him on 16th August, 1966. He also repudiated the allegation that during the meeting he said that, if the petitioner was not taken out of the college, he would write adverse remarks in the transfer certificate. The Principal also denied that the petitioner's expulsion from the college was due to personal animosity and imaginary grudge, which Mr. Muthukannappar had against the petitioner. He denied that the impugned order was passed vindictively out of any bias or any other extraneous considerations.

In the reply affidavit the petitioner reiterated that the entire order of dismissal was engineered by Mr. Muthukannappar, who had a grudge against him. He denied that the reports alleged to have been made against him were shown to him by the Principal. He further denied that his attitude was arrogant and unbecoming of a student towards the Principal. He also reiterated his statement that his brother saw the Principal on 16th August, 1966, as 13th, 14th and 15th were Government holidays. At the time of the interview of his brother with the Principal, he stated that no charges were shown to his brother or an opportunity accorded to the brother for explaining the charges. He also denied the allegation that he went round organising a strike. The petitioner also filed supporting affidavits from four persons, namely, S. D. J. Pandian, P. K. Rajan, Nargunam and Noble Narendra Singh. S. D.J. Pandian, the brother of the petitioner, stated in his affidavit that at about 10-45 A.M. on the 16th August, 1966, he met the Principal along with his friend Mr. Nargunam, Advocate, and that during the interview the Principal told him that, if he was not taking the petitioner out of the college, he would write adverse remarks in the transfer certificate. The Principal refused to give him or the petitioner any opportunity to explain their case.

Mr. Nargunam, Advocate, in his affidavit stated that Pandian met the Principal at 10-45 A.M. on 16th August, 1966, and that the Principal wanted Pandian to take

his brother out of the college and that, if he did not do so, he would write adverse remarks in the transfer certificate, and that an opportunity to explain the matter against the petitioner was denied by the Principal.

P.K. Rajan, a student studying along with the petitioner, in his affidavit stated that Mr. Muthukannappar, head of department of Tamil, called him and asked him whether he was aware of the indisciplined way in which the petitioner was behaving in the college and that, when he replied in the negative, Mr. Muthukannappar threatened him and warned him that he would suffer, if he deposed in favour of the petitioner.

Noble Narendra Singh, who is studying in the college and who knows the petitioner, stated in his affidavit that Mr. Muthukannappar wanted him to give a petition against the petitioner and that he declined. He stated he was also aware of the fact that Mr. Muthukannappar was gathering complaints against the petitioner.

On the allegations in the affidavits and the counter-affidavits and reply affidavit certain questions of fact have to be decided. Firstly, it is the contention of the petitioner that Mr. Muthukannappar, head of the department of Tamil, was responsible for his dismissal due to prior animosity. The parties are also not agreed as to what happened when the Principal met the petitioner on 9th August, 1966. According to the petitioner, the Principal charged him with indisciplined conduct, and when the petitioner requested for an opportunity to explain the matters and the charges against him, the Principal got angry and suspended him. According to the Principal, he showed the complaints and enquired him about the incidents but the petitioner behaved in an arrogant manner and, as the Principal thought that no useful purpose would be served, he suspended the petitioner and directed the petitioner to come with his parents and meet him which the petitioner did not do. Further, according to the petitioner, his brother accompanied by Mr. Nargunam met the Principal and asked for an opportunity to explain the matter, which was denied to the petitioner. According to the Principal, nobody ever saw him on the 16th, and Pandian came and saw him only on 23rd August, 1966, and asked for the P.U.C. grade certificates. It is necessary to consider which of the two versions is true. The allegation against Mr. Muthukannappar is that he was a Congress M.L.C., and his appointment as head of Tamil department in Arts College was criticised in the assembly in July, 1966. It is stated that Mr. Muthukannappar imagined that the petitioner was responsible for giving information regarding him to the members of the opposition party in the assembly. It is also alleged that Mr. Muthukannappar threatened the petitioner several times stating that he would send the petitioner out of the college and with this end in view he was collecting complaints from several students against the petitioner. The affidavits of two students are also filed in support of the allegation that Mr. Muthukannappar was collecting complaints against the petitioner. It is the case of the petitioner that, as Mr. Muthukannappar was a Congressman and influential, he instigated the Principal to dismiss the petitioner. The allegation that Mr. Muthukannappar suspected the petitioner as being responsible for giving information to the members of the the opposition seems to be purely imaginary. The appointment of Mr. Muthukannappar was published and the members of the opposition party would certainly have known about it. The petitioner come to know Mr. Muthukannappar only in July, 1966, and there is no basis for the suspicion that the petitioner gave information. It is even more unlikely that Mr. Muthukannappar suspected that the petitioner was responsible for giving information. The allegation that Mr. Muthukannappar was collecting complaints against the petitioner does not also carry conviction. Mr. Muthukannappar is the convenor of the disciplinary committee and he received complaints from Sri Govindarajan, Assistant Professor of Tamil and Senior N.C.C. Officer in Government Arts College, and from one student Nandagopal, whom the petitioner is alleged to have threatened. I am unable to accept the statement of the petitioner that Mr. Muthukannappar threatened to get

the petitioner dismissed or was collecting comlpaints against the petitioner. It may be that after reports have been received from Sri Govindarajan and Nandagopal as convenor of the disciplinary committee Muthukannappar might have questioned some students as to the incidents. I am not persuaded to accept the plea of the petitioner that Mr. Muthukannappar threatened to get the petitioner dismissed or collected complaints against him. The charge of the petitioner that the Principal acted on the instigation of Mr. Muthukannappar cannot be accepted. The Principal took charge of his post only after the college reopened this year, and it is not likely that he would have known Mr. Muthukannappar who was freshly appointed to his post, intimately. It is far-fetched to state that being afraid of the influence of Mr. Muthukannappar the Principal in order to oblige him dismissed the petitioner. I am unable to accept the allegations made against Mr. Muthukannappar or the allegation that the Principal at his instigation acted *mala fide* in dismissing the petitioner.

Coming now to the next allegation of the petitioner that when the Principal met him on 8th August, 1966, he suggested that the petitioner may take the transfer certificate, that otherwise a complaint would be lodged against him and that if he took the transfer certificate he will give the seat to some other students, the suggestion obviously is that the Principal threatened him and forced him to take the transfer certificate in order to provide a seat for another student. The Principal has denied this allegation. In my view, it would have been most unlikely that the Principal threatened the petitioner with dire consequences if he did not take the transfer certificate for the purpose of providing a seat to another student. It could not have been that the Principal was unable to find a seat otherwise. It is not probable that the Principal would have induced an innocent person to take the transfer certificate in order to provide a seat to another person. It is equally unlikely that he would have threatened the petitioner with dire consequences if he did not take the transfer certificate. These allegations have to be rejected as unfounded.

It may be noted in this connection that the Principal has stated in his counter-affidavit that he expected the guardian or the parents of the petitioner to turn up so that he could place all the matters before them and advise the petitioner as in the case of the other student whose apology has been accepted.

It is contended by the petitioner that on receipt of the suspension order which also directed the petitioner to meet the Principal with his parents or guardian, the petitioner's brother met the Principal on the 16th, but Principal, without assigning any reasons, directed him to take the transfer certificate, threatening that otherwise he would write adverse remarks in the transfer certificate. It is further stated that no opportunity was given to the petitioner's brother to explain the petitioner's conduct. To substantiate this statement, the affidavit of Mr. Nargunam has been filed. The Principal stated that neither Pandian nor anyone else met him on 16th August, 1966. He also denied that there was any incident as spoken to by the petitioner on 16th August, 1966. According to the Principal, the brother of the petitioner saw him on the 23rd and asked him for the return of the P.U.C. grade certificate which was given to the petitioner. It has to be noted that in the affidavit of the petitioner, he has not stated that the petitioner's brother accompanied by Mr. Nargunam met the Principal on the 16th. If Mr. Nargunam accompanied the brother of the petitioner as contended now, I do not see any reason why it was not stated in that affidavit that Mr. Nargunam accompanied the petitioner's brother. The non-mention of Mr. Nargunam's name probabilises the statement of the Principal that nobody met him on the 16th. The statement of the petitioner's brother is interested. I do not see any reason for rejecting the statement of the Principal. I am satisfied that there was no meeting between the brother of the petitioner accompanied by anybody else and the Principal on the 16th. On the 16th, the Principal sent a communication to the guardian of the petitioner, the relevant portion of which reads thus :

"The College Council met on 16th and decided to issue the transfer and conduct certificates to your son. Accordingly, his transfer certificate and conduct certificate are sent herewith."

The order is challenged on the ground that it was passed by the College Council without giving an opportunity to the petitioner to explain the allegations against him and that as a quasi-judicial tribunal, the council was bound to observe the principles of natural justice and give a reasonable opportunity to the petitioner to state his case. The contention of the Principal in his supplementary counter, is that the decision to expel and to issue the transfer certificate and conduct certificate was taken by him and the function of the College Council was only advisory.

Before dealing with this aspect, the question to be considered is, whether it be the Principal or the College Council, is it a quasi-judicial tribunal and is the petitioner entitled to claim the principles of natural justice ? In *C. D. Sekkilar* v. *Krishnamurthy*[1] Subba Rao, J., (as he then was) observed that it would be seen from the Madras Educational Rules and the clauses of the scheme of management of the college (Pachiappa's College) that the college is a public institution and the Principal and the College Council in discharging their duties are governed by the Madras Educational Rules and the Disciplinary Regulations issued by the University and the clauses of the scheme framed by the High Court and therefore, the Principal is holding a quasi-public office and is bound to discharge his duty in accordance with the rules governing the institution and regulating his conduct. There can be no doubt that the Government Arts College in the instant case, which is run by the Government with public funds and governed by the Madras Educational Rules and the Disciplinary Regulations issued by the University, is a public institution and the Principal is holding a quasi-public office bound to discharge his duties in accordance with the rules.

In *University of Madras* v. *Nagalingam*[2], a Bench of this Court held that an academic authority in imposing a punishment, is not merely discharging an administrative act but was functioning as a quasi-judicial tribunal, In *Board of High School* v. *Ghanshyam*[3], the Supreme Court held that the examination committee, when it exercises its powers in cancelling the results of the students and declaring that they have been debarred from appearing in the examination, was acting quasi-judicially and the principles of natural justice would require that the student must be heard. These two decisions are sufficient authority for holding that the student is entitled to the principles of natural justice. Subsequent decisions if at all have widened the area where the principles of natural justice are applicable.

The Supreme Court in coming to its decision *Board of High School* v. *Ghanshyam*[3], reiterated at page 1113 the principles laid down by it in the *Province of Bombay* v. *K. S. Advani and others*[4], where it was held :

"........ if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially.

The principles that were laid down in *Province of Bombay* v. *K. S. Advani and others*[4], were based on the rule laid down in *Rex* v. *Electricity Commissioners, London Electricity Joint Committee Co.* (1920) Ex parte[5], which ruled :

"Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

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1. (1951) 2 M.L.J. 568 : A.I.R. 1952 Mad. 151.
2. (1964) 2 M.L.J. 251 : I.L.R. (1964) 1 Mad. 582.
3. (1963) 2 S.C.J. 509 : A.I.R. 1962 1110.
4. (1950) 2 M.L.J. 703 : (1950) S.C.J. 451 : (1950) S.C.R. 621, 725.
5. L.R. (1924) 1 K.B. 171, 205.

Lord Hewart, C.J., in *Rex* v. *Legislative Committee of The Church Assembly, Haynes Smith,* Ex parte[1], construed the decision *Rex* v. *Electricity Commissioners, London Electricity Joint Committee Co.* (1920) Ex parte[2], as meaning that before the decision of any authority could be subjected to writ jurisdiction, it must appear that the said body should have legal authority to determine questions affecting the rights of subjects and should further be required to act judicially. The view that there must be a duty and that that authority should further be required to act judicially was not accepted by the House of Lords in a recent decision in *Ridge* v. *Baldwin*[3]. According to Lord Reid, this was a gloss which was put by Lord Hewart, C.J., and not laid down in *Rex* v. *Electricity Commissioners; London Electricity Joint Committee Co.* (1920), Ex parte[2], and he observed that principles of natural justice would flow from the nature of the *lis*. This interpretation of *Rex* v. *Electricity Commissioners, London Electricity Joint Committee Co.* (1920), Ex parte[2], which is different from the interpretation put by Lord Hewart in *Rex* v. *Legislative Committee of the Church Assembly Haynes-Smith,* Ex parte[1], was accepted by the Supreme Court in *A. C. Companies* v. *P. N. Sharma*[4], where Gajendragadkar, C.J., observed :

> " .... the area where the principles of natural justice have to be followed and judicial approach has to be adopted, has become wider and consequently the horizon of the writ jurisdiction has been extended in a corresponding measure."

As a result of the decision of the House of Lords in *Ridge* v. *Baldwin*[3], and the decision of the Supreme Court in *A.C. Companies* v. *P. N. Sharma*[4], the requirement that the authority should act judicially can be inferred from the nature of the decision which the Tribunal has to come to. In the case of a Principal or a College Council which conducts an enquiry for the purpose of dismissing a student, apart from the authority of *University of Madras* v. *Nagalingam*[5], and *Board of High School* v. *Ghanshyam*[6], there can be no doubt that the duties of a Principal in dismissing a student fall within the rule laid down in *Ridge* v. *Baldwin*[3], and *A. C. Companies P.N. Sharma*[4], and he is bound to observe principles of natural justice.

It is difficult to define natural justice. Lord Parker, in *Reg.* v. *Registrar of Building Societies* Ex parte *a Building Society*[7], stated:

> " I always find the expression " natural justice " very difficult. There is no one code of natural justice which is automatically imported into any procedure of a judicial nature. What is imported by way of natural justice depends entirely on the tribunal or official in question, the nature of the functions, and, perhaps most important of all, the exact words of the statute, ... Each case most depend upon the nature of the function and the exact words of the statute."

The foremost principles of natural justice are (*i*) that a man cannot be judge in his own cause, and (ii) *audi alteram partem*, which means, that both sides of a case must be heard before it can be decided. We are concerned with the principle of *audi alteram partem*. Lord Reid in *Ridge* v. *Baldwin*[1], explaining the principle *audi alteram partem* stated thus at page 64:

> " The Principle *audi alteram partem* goes back many centuries in our law and appears in a multitude of judgments of judges of the highest authority. In modern times, opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured, therefore it does not exist."

After an elaborate discussion of the case-law, the learned Judge held that the power of dismissal in the Act of 1882, could not then have been exercised and cannot now be exercised until the watch committee have informed the constable of the grounds

1. L.R. (1928) 1 K.B. 411.
2. L.R. (1924) 1 K.B. 171, 205.
3. L.R. (1964) A.C. 40.
4. (1966) 1 S.C.J. 786: (1965) 2 S.C.R. 366: A.I.R. 1965 S.C. 1595, 1601.
5. (1964) 2 M.L.J. 251 : I.L.R. (1964) 1 Mad. 582.
6. (1963) 2 S.C.J. 509 : A.I.R. 1962 S.C. 1110.
7. (1960) 2 All E.R. 549 : (1960) 1 W.L.R. 669, 676.

on which they propose to proceed and have given him a proper opportunity to present his case in defence.

It has been held that no person could be damnified without being informed of the charge against him or being given an opportunity of rebutting it. The procedure that has to be adopted in guaranteeing this right of informing the person of the charge against him and giving him an opportunity or rebutting it will depend upon the nature of the Tribunal. In *Local Government Board* v. *Arlidge*[1], Lord Shaw observed at page 138:

> " If a statute prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means. In regard to these, certain ways and methods of judicial procedure may very likely be imitated; and lawyer-like methods may find special favour from lawyers. But that the judiciary should presume to impose its own methods on administrative or executive officer is a usurpation. And the assumption that the methods of natural justice are *ex necessitate* those of Courts of justice is wholly unfounded."

The right to examination and cross-examination which are taken for granted in most legal conflicts is not always a necessary requirement of natural justice before all Tribunals. The right to be heard may be satisfactorily complied with, in the case of certain Tribunals, by receiving explanatory statements. It has also been held that a personal hearing is not a requisite in complying with the rule of the right to be heard. When the Principal of a college or the College Council acts as a quasi-judicial Tribunal, one may normally expect the Principal to contact the student and apprise him of the allegations against him and ask him as to what he has got to say on the charges. A reasonable opportunity should be given to the student to prove his innocence. Here again, what is reasonable opportunity would depend upon the facts of each case.

There is some divergence of opinion as to whether a quasi-judicial authority should give reasons for his order. As far as the Principal of a college is concerned, an order of dismissal is not necessarily bad on the ground that no reasons are given. Jagadisan, J., disagreeing with the view of Veeraswami, J., in *Nagalingam* v. *University of Madras*[2], that the Syndicate must give reasons for its action, held in Writ Petition No. 922 of 1961:

> " The fact that the disciplinary proceedings are of a quasi-judicial nature is not sufficient to compel the Syndicate to write a judgment giving reasons. In a case where the order of a quasi-judicial Tribunal is subjected to an appeal or revision by a superior authority, the absence of reasons may vitiate the order as the Court or Tribunal sitting in appeal or revision should not be in the dark as to the basis of the decision arrived at and impugned before them. But this principle cannot be invoked to invest this Court with the power to issue writs quashing orders which do not unfold their own story. In other words, an unspeaking order is not *ex facie* bad because of its muteness. An order bereft of reasons, because the Tribunal was not obliged to give reasons, is colourless...... In my opinion, the impugned order should not be held to be bad on the ground that *ex facie* it is not supported by reasons."

A Bench of this Court in *University of Madras* v. *Nagalingam*[3], while reversing the decision of Veeraswami, J., in *Nagalingam* v. *University of Madras*[2], quoted with approval the observations of Jagadisan, J., in Writ Petition No. 922 of 1961 that it is not obligatory upon the Syndicate to write a judgment giving reasons and that an unspeaking order is not *ex facie* bad because of its muteness.

A few decisions of the Supreme Court were relied on by the learned Counsel for the petitioner in support of the contention that the order of dismissal should give reasons. In *Harinagar Sugar Mills* v. *Shyam Sunder*[4], the Supreme Court held that the Central Government, when exercising its powers under section 111 of the Companies Act, is a Tribunal and is bound to follow a judicial approach and give

1. L.R. (1915) A.C. 120
2. (1963) 1 M.L.J. 24: I.L.R. (1963) Mad. 177.
3. (1964) 2 M.L.J. 251 : I.L.R. (1964) 1 Mad. 582.
4. (1963) 1 S.C.J. 471 : (1962) 2 S.C.R. 339 : A.I.R. 1961 S.C. 1669.

sufficient grounds in support of its order. In a recent decision of the Supreme Court *M. P. Industries Ltd.* v. *Union of India*[1], Bachawat, J., speaking for the majority rejected the contention that every appealable order under Article 136 of the Constitution must be a speaking order and the omission to give reasons for the decision is by itself sufficient ground for quashing it. The majority expressed its view that an order of an administrative tribunal rejecting a revision application cannot be pronounced to be invalid on the sole ground that it does not give any reasons for the rejection. The Court distinguished the decision in *Harinagar Sugar Mills* v. *Shyam Sunder*[2], on the ground that there was vital difference between an order of reversal of the appellate authority in *Harinagar Sugar Mills* v. *Shyam Sunder*[2], where no reason whatsoever was given, and the case before their Lordships, which was one of affirmance. Subba Rao, J., (as he then was) in his dissenting judgment expressed the view that it was essential that some restriction should be imposed on the Tribunal in the matter of passing orders affecting rights of parties and the least that they could do was to give reasons for their orders.

In *Govindarao* v. *State of M.P.*[3], the Supreme Court held that the Government, while passing an order under section 5 (3) of the Central Provinces and Berar Revocation of Land Revenue Exemption Act not granting money or compensation to persons, must give reasons for the order, as the Government has a duty to act in a judicial manner and the claimants are entitled to know the reason as to why their claim for the amount of money or compensation is being rejected by the Government.

As seen from a discussion of the case-law, there is some difference of opinion as to whether a quasi-judicial Tribunal should give reasons for its order or not. While the Supreme Court held in *Harinagar Sugar Mills* v. *Shyam Sunder*[2], that the Central Government, while acting as the appellate authority under section 111 of the Companies Act should give reasons for its order, in *M.P. Industries Ltd.* v. *Union of India*[1], it distinguished the decision holding that an order of a Tribunal rejecting a revision application cannot be pronounced to be invalid on the sole ground that it does not give reasons for the rejection. Subba Rao, J., (as he then was) dissented from this view and expressed his opinion that the Tribunal should give reasons for its order. In *Govindarao* v. *State of M.P.*[3], the Supreme Court held that the Government, while acting under section 5 (3) of the Central Provinces and Berar Revocation of Land Revenue Exemption Act, should give reasons for its order.

The cases dealt with by the Supreme Court relate to the discharge of a statutory duty by a Tribunal where the Tribunal is under a duty to follow the provisions of a statute. As already observed, the procedure that may be followed by all Tribunals need not be uniform and each Tribunal is at liberty to prescribe its own procedure provided the principles of natural justice are observed in that the aggrieved person is informed of the charge and an opportunity is given to him for rebutting it. The principles of natural justice have not been extended to include a right to require a quasi-judicial Tribunal to give reasons for its order though in some cases where the order of the Tribunal is subject to appeal, reasons are required to be given. It cannot be said that the decisions of the Supreme Court which hold that reasons should be given would cover Tribunals in the nature of principals of educational institutions. Regarding the question whether the Principal of a college should give reasons for his order, there is the authority of this Court in *University of Madras* v. *Nagalingam*[4], which approved the view of Jagadisan, J., in Writ Petition No. 922 of 1961 that it is not obligatory upon the Syndicate to write a judgment giving reasons and that an unspeaking order is not *ex facie* bad because of its muteness.

In applying the principles laid down by the decisions cited above, it has to be considered whether the principle of natural justice has been observed in this case. It has been found that the petitioner was called by the Principal and the complaints

1. (1966) 1 S.C.J. 204: A.I.R. 1966 S.C. 671.
2. (1963) 1 S.C.J. 471: (1962) 2 S.C.R. 339: A.I.R. 1961 S.C. 1669.
3. (1966) 1 S.C.J. 480: (1965) 1 S.C.R. 678: A.I.R. 1965 S.C. 1222.
4. (1964) 2 M.L.J. 251: I.L.R. (1964) 1 Mad. 582.

against him were read out to him and he was asked to explain. The petitioner denied the charges and did not behave properly. He was suspended and asked to meet the Principal with his parents or guardian. It has also been found that neither the petitioner nor his guardian met the principal till the 21st when the petitioner's brother asked for the grade certificate of the petitioner. It is no doubt true that no formal charge was framed against the petitioner but a reading of the complaints would be sufficient compliance and the failure to frame formal charges would not vitiate the order. It may be noted that, according to the Principal, he wanted to place the matters before the parents and advise the petitioner, as in the case of the other student, not to indulge in such undesirable activities. The Principal did not expect that the petitioner's parents would ignore and refrain from meeting him. The petitioner and his guardian were in fact given an opportunity to explain the petitioner's conduct but they did not avail of it. Therefore, the petitioner cannot be heard to say that no reasonable opportunity was given to him.

Taking all the circumstances into consideration it cannot be said that there was any violation of the principles of natural justice. On the materials on record I am satisfied that the Principal did read the complaints to the petitioner and asked him for his explanation and directed the guardian to meet him but the petitioner did not avail himself of that opportunity. This would normally conclude the case against the petitioner as the High Court will not interfere when the principles of natural justice had been followed unless the authority acted arbitrarily or abused its discretion.

But there is some uncertainty as to whether the Principal himself took the decision to expel the petitioner or whether the College Council was responsible for taking the decision. This question assumes importance as the petitioner has got a right to be heard by the authority that expelled him. The Principal, in his counter-affidavit, stated in paragraph 2 as follows :

> " Further it may be seen from the facts set out hereunder that the decision to expel the petitioner was by the College Council of which I am a member and not solely by me in my individual capacity."

In paragraph 5 of the counter-affidavit, the Principal stated:

> " Therefore I had no other alternative except to place the entire matter before the College Council on 16th August, 1966, and take such action as the Council may deem fit. The College Council consisting of gazetted officers and heads of departments which met on 16th August, 1966, unanimously decided to issue transfer and conduct certificates to the petitioner as they felt that continuance of the petitioner is not at all conducive to the discipline and morale of the college. A letter to this effect, dated 16th August, 1966, was despatched on 18th August, 1966."

The letter referred to in the counter- affidavit reads:

> " The College Council met on 16th and decided to issue the transfer and conduct certificates to your son. Accordingly, his transfer certificate and conduct certificate are sent herewith."

The allegation in paragraph 2 of the counter-affidavit is very specific that the decision to expel the petitioner was by the College Council and not by the Principal in his individual capacity. The statement in paragraph 5 is equally explicit that the matter was placed before the College Council and for such action as they may deem fit and they unanimously decided to issue the transfer and conduct certificates to the petitioner as they felt the continuance of the petitioner was not conducive to the discipline and morale of the college. The communication sent is also clear that it was the College Council that decided to issue the transfer and conduct certificates. There cannot be a more definite statement by the principal that it was the College Council that decided to issue the transfer and conduct certificates. While so, in the supplementary counter-affidavit, the Principal has explained that the College Council is consulted before taking any major decision affecting the students and that the recommendation of the Council is only recommendatory and not

mandatory. He further explained that the Council unanimously agreed with his view but the final decision to expel the petitioner was only by him. In view of the contradictory statements and in the absence of any other material, it is difficult to come to a conclusion whether it was the Principal or the College Council that took the decision to expel the petitioner. It is admitted that the Principal is empowered under rule 97 of the Madras Educational Rules to inflict the punishment of expulsion. But as a reasonable doubt is created as to whether it was the Principal or the College Council that took the decision, it has become incumbent on this Court to set aside the order of dismissal. It is needless to say that if the order of dismissal was by the College Council, it cannot be sustained, as the petitioner had no opportunity to explain his case before the College Council. The order of dismissal will, therefore, be set aside but the Principal or the College Council, whoever may be the punishing authority under the constitution of the college, will, if they so desire, conduct a fresh enquiry against the petitioner and take its own decision. They are at liberty to accept the explanation of the petitioner if it is convincing or to pardon him if they are satisfied with the apology, or to proceed with the enquiry and to punish or exonerate the petitioner. I have no doubt that the Principal is not prejudiced against the petitioner and would act unbiased as from the counter-affidavit it is clear that he was quite prepared to explain the matter to the parents of the petitioner and advise the petitioner against indulging in undesirable activities and has in fact pardoned the other student.

In conclusion, it may also be pointed out that the issuing of the transfer certificate is not in accordance with the University Regulations, chapter 30, rule 4 of which provides that if any student is expelled from an affiliated college, intimation of the fact of expulsion with the statement of reasons therefor shall be given forthwith by the Principal (*a*) to the parent or guardian of the student, and (*b*) to the Syndicate. The intimation to the Syndicate shall be accompanied by the transfer certificate of the student and the Syndicate, on the application of the student or his parent may, after making such enquiry as it deems fit and proper, deliver the certificate to the student with any necessary endorsement or withhold it temporarily or permanently. So neither the Principal nor the College Council was in order in sending the transfer certificate and conduct certificate to the mother of the petitioner. The Principal himself admitted that the transfer certificate was despatched to the petitioner's mother by mistake instead of being forwarded to the University. While the Principal has power to expel a student, he is required to send intimation of the fact of expulsion and the statement of reasons, accompanied by the transfer certificate of the student, to the Syndicate. It is the duty of the Syndicate on the application of the student, or his parent, to deliver it to him after making an enquiry with the necessary endorsement. The despatch of the transfer certificate to the petitioner's mother is, therefore, not in accordance with the University Regulations and will, therefore, be withdrawn.

In the result, the Writ Petition No. 2203 of 1966 is allowed and the order of expulsion of the petitioner from the college is set aside and the transfer certificate issued to the petitioner is withdrawn. The Principal or the College Council is at liberty to conduct a fresh enquiry if they so desire. There will be no order as to costs.

In view of the judgment in Writ Petition No. 2203 of 1966, no orders are necessary in Writ Petition No. 2204 of 1966.

S.V.J. *Writ Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE R. SADASIVAM.

Sudalaimuthu Nadar and another .. *Petitioners* *

Prevention of Food Adulteration Rules (1955), *rule* 5, *Appendix B*, *Clause A*. 17.11—*Gingelly oil—Butyro-refractometer test—Reading not conforming to specification under Clause A.* 17.11—*Oil is adulterated—Rule requiring conformity in terms of Butyro-refractometer reading—Not* ultra vires *the rule making powers.*

If gingelly oil does not satisfy the requirement of Butyro-refractometer test, by showing the reading between 58 and 61 as required by Clause A. 17.11 in Appendix B to rule 5 of the Prevention of Food Adulteration Rules, it would be adulterated.

It is no doubt desirable that the sample should be tested for every one of the standards mentioned in the rules. But non-conformity with the requirements in respect of any of the standards mentioned in Clause A. 17.11 in Appendix B to rule 5 is itself sufficient to show that the gingelly oil is adulterated.

The argument that, the rule framed under the Prevention of Food Adulteration Act providing that gingelly oil not conforming to the specification as regards the Butyro-refractometer reading is adulterated, is *ultra vires* of the rule making power of the Central Government under section 23 (1) (*b*) of the Act, is untenable.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of Session of Madurai, dated 7th August, 1965, and passed in C.A. No. 73 of 1965 (C.C. No. 375 of 1964 on the file of the Court of the District Magistrate, Madurai).

G. Gopalaswami, E. S. Raja and *K. Selvaraj*, for Petitioners.

R. Veeramani, for the Public Prosecutor, for the State.

The Court made the following

ORDER.—Petitioners Sudalaimuthu Nadar and Murugiah Nadar are the owners of a grocery shop in Dindigul Road, Madurai, and the salesman in the shop respectively, and they have been convicted under section 16 (1) (*a*) (i) of the Prevention of Food Adulteration Act (hereinafter called the Act) for having sold adulterated gingelly oil and sentenced to pay a fine of Rs. 75 each. The conviction is based on the report Exhibit P-7 that the sample of the gingelly oil taken from the shop of the petitioners gave a reading of 62.5 when examined at 40°C. with the help of Butyro-refractometer, whereas according to the standard fixed in Clause A. 17.11 in Appendix B to rule 5 of the Prevention of Food Adulteration Rules, it should only be between 58 and 61. C.W. 1 Narayanaswamy, Public Analyst, Madurai Municipality, was examined to speak to the report and gave expert opinion, though he did not actually do the test in this case. Both the Courts below found that gingelly oil sold by the petitioners was adulterated and *prima facie* this will be a question of fact.

Sri G. Gopalaswami, Advocate for the petitioners, urged that the rule framed under the Act providing that the gingelly oil not conforming to the specification as regards the Butyro-refractometer reading is adulterated is *ultra vires* of the rule making power of the Central Government. Section 2 (i) (1) of the Act provides that an article of food shall be deemed to be adulterated if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities which are in excess of the prescribed limits of variability. Under section 23 (1) (*b*) of the Act, the Central Government may make rules defining the standards

* Crl. R.C. No. 1543 of 1965 13th April, 1967.
Crl. R.P. No. 1518 of 1965.

of quality for, and fixing limits of variability permissible in respect of any article of food.

The contention of the learned Advocate for the petitioners is that the Central Government cannot, in framing rules defining the standards of quality make a condition that an article of food should satisfy a reading of Butyro-refractometer or other instrument. He relied on certain passages in Volume II of 'Oils; Fats and Waxes' by Lewkowitsch as throwing doubt about the efficacy of such Butyro-refractometer tests. Before referring to the passages, I deem it necessary to make one or two observations, namely, that Volume I of the above book is of the year 1913 and Volume II of the year 1914. This observation is intended only to point out that the two volumes of the book are more than half a century old. Further, the several passages relied on by the learned Advocate for the petitioners deal with butter fat and not with edible or vegetable oils. At page 817 of Volume II of the book the author has stated that owing to the rapidity with which the observation can be carried out, its importance has been sometimes overestimated, and it should therefore be distinctly remembered that the refracto metric examination can only be used as a sorting test, and that its indications must be supported by further tests. In the next page, the author has pointed out that "samples which give values lying outside the limits stated in the table must be looked upon as suspicious, or at least as 'abnormal', and further examination is required to establish whether a sample is pure or not." Thus, according to the author, even if, a sample furnishes numbers lying within the values, the conclusion must not yet be drawn that the sample is genuine. There could be no objection to this observation as several edible oils, having varying permissible range of refractive index could well have the same refraction index within the said range. Hence, to find out whether a particular edible oil, namely, gingelly oil is pure, one cannot rely merely on the refractive index test, but I shall presently show that if the oil does not satisfy the requirement of Butyro-refractometer test, by showing the reading between 58 to 61, it would be clear that oil is not pure gingelly oil. The learned Advocate for the petitioners pointed out a passage at page 819 of Volume II of the above book to show that 'refraction increases in a much greater ratio with the increase of unsaturated fatty acids; in other words, the higher the iodine value the higher will be the refraction.' Thus, the refraction may be higher than the permissible limit on account of the iodine value or admixture of other oils or impurities. At page 820 of Volume II it is pointed out that "refractometer figures lying outside the numbers given in the tables do not unmistakably point to adulteration, but they certainly point to an 'abnormal' butter," and that "further investigation must show whether the sample under examination is adulterated butter or not." But it is clear from page 327 of Volume I of the book that "the objection of the earlier observers, *viz.*, that the refractive index is greatly influenced by the methods of refining, the age of oil, the amount of free fatty acids, and the amount of oxidation a specimen has undergone, are unfounded to a great extent, more recent researches having proved that very valuable indications (especially in the case of butter fat) can be gained from the determination of the refractive index." The learned Advocate for the petitioners commented on the fact that the report, Exhibit P-7, does not show whether tests have been done to find whether the sample of gingelly oil satisfied the other standards mentioned in A-17.11 in Appendix B to rule 5 of the Rules, such as iodine value etc. Though C.W. 1 has been examined in this case, no question has been put to him about this aspect of the case. It is clear from the decision of Narasimhan, C.J., in *Jogendra Khuntia* v. *State of Orissa*[1], that,

> "Non-conformity with the requirements in respect of any of the tests laid down in A.17.06 (the case related to mustard oil) is itself sufficient to show that the oil is not of the standard purity required by the statute."

Page 217, Volume II, of 'Oils, Fats and Waxes' by Lewkowitsch gives in a tabular form the physical and chemical characteristics of sesame oil. The last column

1. I.L.R. (1964) Cut. 778 at 783.

of the table refers to refractive index. It refers to the observations by several eminent scientists. It appears from that column that so far as Indian gingelly oil is concerned, the refractive index of pure gingelly oil should be between 59.6 to 60 at 40°C. according to the Butyro-refractometer. If the refractive index of any sample of gingelly oil does not satisfy this requirement, it is clear that it is not pure gingelly oil. The quality referred to in section 2 (i) (1) of the Act means the characteristics of an articled food. One of the characteristics of edible oils, including gingelly oil, is the fairly constant refractive index according to the well-known tests. The Central Government has been given powers under section 23 (1) (*b*) of the Act to make rules for fixing limits of variability permissible in respect of any article of food after consulting the committee as contemplated in the section. The rule provides for the standard namely, refractive index of gingelly oil at 40°C. should be between 58 and 61. The evidence of C.W. 1 is that Butyro-refractometer reading is an expression of refractive index showing the physical constant of the oil. It indicates the perceptivity of the oil to light; in other words to reflect light rays. C.W. 1 has stated that the reading of 62.1 shown by the sample of gingelly oil in this case under the Butyro-refractive test is a positive indication of adulteration. Having regard to the above facts, it could not be said that the Central Government acted beyond its rule making powers in stating that edible oils should satisfy particular standards as to refractive index under Butyro-refractometer.

The learned Advocate for the petitioners urged that the Butyro-refractometer employed in this case is defective and he relied on the fact that in another case a sample of oil tested by the Analyst of the Madurai Municipality showed the sample did not satisfy the requirements of the rule as to Butyro-refractometer reading, whereas the sample sent to the Gentral Food Laboratory, Calcutta, showed that the oil in question satisfied the requirement thereby indicating that it was not adulterated. The learned Sessions Judge who heard the appeal has rightly pointed out that merely because in another case there is difference between the Butyro-refractometer reading taken by the Public Analyst at Madurai and by the Analyst at the Calcutta Food Laboratory it cannot be said that there is doubt in regard to the correctness of the Butyro-refractometer reading taken in the case. It was open to the petitioner to have sent the sample given to him to the Central Food Laboratory as contemplated in the Act.

The learned Advocate for the petitioners contended that samples seized in food adulteration cases should be tested for every one of the standards mentioned in the rules. Thus, according to him, in the case of gingelly oil, it is not sufficient to merely take the Butyro-refractometer reading in respect of the sample of gingelly oil, but it should also be found out whether the sample satisfies the standard as to saponification value, iodine value, unsaponifiable matter, free fatty acid and the Bellier test as to turbidity temperature. Exhibit P-7 does not give any indication that the sample was tested in respect of the matters other than the refractive index. It is no doubt desirable that the sample should be tested for every one of the standards mentioned in the rules. But as already stated, even C.W. 1 was not examined to show whether the sample was tested in respect of the several matters and as to the result of the same. Further as already pointed out non-conformity with the requirements in respect of any of the standards mentioned in A-17.11 in Appendix B to rule 5 of the rules is itself sufficient to show that the oil is adulterated. I am unable to accept the vague contention put forward by the learned Advocate for the petitioners towards the end of the arguments that the sample of gingelly oil might have got adulterated on account of the vessel of the petitioners used in measuring and giving the oil.

I see no ground to interfere with the conviction of the petitioners or the sentence of fine imposed on them. The Criminal Revision case is dismissed.

V.K. *Revision case dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. RAMAMURTI.

Jainalabdeen Rowther and others .. *Appellants**

v.

Pappathi Ammal *alias* Mohamed Meeran Bibi and others .. *Respondents.*

Mahomedan Law—Rule against creation of life estate and vested remainder—Family arrangement supported by mutual consideration in the nature of contract—Not inconsistent with Mahomedan Law—Any settlement in disregard of such family arrangement invalid.

A partition took place between the heirs (five sons) of a Muslim (deceased). Under the partition, one-fourth of the A Schedule properties was allotted to the eldest brother subject to the condition that he shall enjoy the same without powers of alienation. After his lifetime, his wife was to enjoy the same without powers of alienation and after the lifetime of both of them the property was to be taken by the other brothers in equal shares. The deed of partition also contained a provision that in case the eldest brother should beget any issue, those issues shall enjoy the property with absolute powers. The eldest brother executed a settlement in favour of the children of his brothers. Could they enforce their rights under the settlement deed, against the wife of the eldest brother?

Held: The partition deed must be regarded as a family arrangement supported by mutual consideration. It is a perfectly valid and enforceable arrangement binding upon all the parties, thereto, because it is in the nature of contract supported by mutual consideration. The rule of Mahomadan Law against the creation of a life estate and vested remainder has no application to the facts of this case. The settlement executed by the eldest son in favour of the children of one of his brothers is invalid and cannot defeat the rights of his wife derived under the family arrangement.

Appeal against the decree of the District Court, Tiruchirappalli in A.S. No. 494 of 1961.

K. S. Desikan and *K. Raman*, for Appellants.

P. S. Srisailam, for Respondents.

The Court made the following

ORDER.—The plaintiffs, who have failed in the Courts below, are the appellants in this second appeal. The genealogical tree set out in the judgment of the lower appellate Court shows the relationship between the parties. The plaintiffs filed the suit for partition and the controversy in the second appeal relates to the A Schedule properties. Under a sale deed, Exhibit A-2 of the year 1911, the A Schedule properties were purchased by one Kose Vellayappa Rowther and one P. T. S. Mohamed Meera Rowther, (the latter being the predecessor-in-interest of the parties to this litigation. A partition appears to have taken place between this Vellayappa Rowther and Mahomed Meera Rowther in respect of the properties under Exhibit A-2, and Mohamed Meera Rowther became entitled to one half. Under Exhibit A-3 of the year 1946, a partition was effected between the heirs of Mohamed Meera Rowther who died, in 1938, and the heirs being his five sons, Appa Rowther, the eldest, who has been impleaded as the 16th defendant in the suit, had no issues. His wife Ismail Bibi is the 17th defendant. The other three sons are defendants, 18, 19 and 20. One Abdul Kadar, the fifth son, died, and his legal representatives have been impleaded as defendants 11 to 15. The plaintiffs are the children of the 19th defendant. Under this partition, Exhibit A-3 one-fourth share of the A Schedule properties was allotted to the 16th defendant, the eldest brother subject to the condition that he shall enjoy the same without powers of alienation, that after his lifetime his wife, the 17th defendant, shall enjoy the same as above, *i.e.*, without powers

* S.A. No. 37 of 1963. 8th November, 1966.

of alienation, and that after the lifetime of both of them the 16th and the 17th defendants, the A Schedule properties shall be taken by the other brothers in equal shares. The deed of partition also contains a provision that in case the 16th defendant should beget any issue, those issues shall enjoy the properties with absolute powers. Under Exhibit A-1 of the year 1955, the 16th defendant executed a settlement in favour of the children of the 19th defendant. The plaintiffs have filed the suit to enforce their rights under the settlement deed, Exhibit A-1.

From the above narration of facts it will be seen (the 16th defendant having died during the pendency of the suit) that the only person who is really interested in the contest is the 17th defendant, the wife of the 16th defendant. On behalf of the plaintiffs it was contended in the Courts below that the provision in the family partition deed, Exhibit A-3, regarding the share in the A Schedule properties alloted to the 16th defendant by way of life interest in his favour and thereafter again a life interest in favour of his wife the 17th defendant, the vested remainder to be taken by the other brothers, was invalid as being opposed to Mohammadan law, and that the 16th defendant would be entitled to alienate the properties in any manner he liked regardless of the restrictions which had been imposed under the partition deed Exhibit A-3. This objection was overruled by the Courts below on the ground that the rule of Mohamedan Law which does not permit the creation of a life interest and vested remainder would not apply to cases of contracts or family arrangements. The Courts below also held that under this document Exhibit A-3 there was no estate carved out in favour of the 16th defendant, and that really the arrangement was the 16th defendant, should have merely a right to the usufruct and therefore there was no violation of any principles of the Mohamedan Law. Hence the second appeal by the plaintiffs.

It is unnessary to express any opinion as to whether the recital in the partition deed conveys an estate as such to the 16th defendant or merely confers a right upon him to the usufruct or the income from the properties, the corpus remaining undisposed of as I am satisfied that the view taken by the Courts below, that Exhibit A-3, regarded as a family arrangement supported by mutual consideration is a perfectly valid and enforceable arrangement binding upon all the parties thereto and that the rule of Mohamedan Law against the creation of a life estate and vested remainder has no application to the effects of the case, is correct. Before I refer to the reported decisions to which my attention was invited by learned Counsel appearing on both sides, reference may first be made to the unreported judgment of Ramakrishnan, J., in S.A. No. 429 of 1959, in which the learned Judge had to deal with identical situation. In that case, on the death of a Muslim, a partition arrangement was entered into between his heirs, the widow, the son and the daughter, and under that partition arrangement some properties were allotted to the widow subject to the condition that on her death, properties allotted to her and remained undisposed of, shall be taken by the daughters of the son. After the death of the widow, the daughter filed a suit as the heir of the mother claiming partition of the properties allotted to the deceased mother ignoring the specific provision in the partition deed as to what should happen to the properties that were allotted to the mother. There too the same objection was raised on behalf of the plaintiff the daughter that this provision creating as it were a life estate in favour of the widow and the subsequent provision for the devolution of the properties allotted to her on her death offended the rules of the Mohamedan Law. But this argument was not accepted by the learned Judge who held that the arrangement in that case was a family settlement, and that as it was supported by mutual consideration between the parties, the entire partition arrangement was binding upon the parties thereto. The learned Judge has referred to and applied the principle of the leading decisions mentioned in his judgment.

Before I proceed further, I may refer to the statement of the law in 17 Halsbury, page 216, paragraph 357, with regard to the perspective of approach of the Courts concerning the rights and obligations created under a family arrangement.

"Family arrangements are governed by principles which are not applicable to dealings between strangers. The Court, when deciding the rights of parties under family arrangements or claims to upset such arrangements, considers what in the broadest view of the matter is most for the interest of families, and has regard to consideration which, in dealing with transactions between persons not members of the same family, would not be taken into account. Matters which would be fatal to the validity of similar transactions between strangers are not objections to the binding effect of family arrangement."

Vide also paragraph 371 at page 223:—

" Considerations to which the Court gives weight, and which influence the Court favourably, are that disputes are avoided in the family; that the honour of the family is safeguarded, or that various obligations, morally binding on a family are provided for; or that the family property is continued in the family."

In *Jagadish Narain* v. *Ramde Ali*[1], a compromise was entered into to the effect that certain properties to be taken by Bashiran for her life and after her the properties were to be given to one Roza for life and that Bashiran shall have no power to alienate except for necessity. This Bashiran, ignoring the restriction on her power to alienate as per the conditions of the compromise, sold the house, and the question arose whether that sale was valid. The argument was that, even though under the compromise Bashiran was only entitled to a life estate over the house allotted to her and had no power to alienate, the curtailment of her right was repugnant to Mohamedan Law and that Bashiran had an absolute right. This argument was not accepted. The learned Judge dealt with the matter in these terms at page 408 :

" Moreover, one cannot lose sight of the fact that the Courts below have dealt with this agreement as a sort of family arrangement and on that point the authorities are not wanting in which it has been held that in an estate created by contract as a sort of family arrangement transferred to a lady limited ownership is permissible even in Mohamedan Law............I need not refer to several other cases that were referred to, but this much is clear, taking into consideration the circumstances under which the compromise was arrived at, that it was a sort of contract between the parties which the Courts below have determined to be a family arrangement by which certain rights of the property were allowed to Bashiran by the other members of the family and there were certain restrictions also placed upon her power to alienate. In view of the various authorities that have been discussed above I do not think there was anything repugnant to Mohamedan Law in this family arrangement and therefore the interest which Bashiran had, was a life interest in the property."

I may next refer to the decision of the Privy Council in *Khaja Solehman Quadir* v. *Salimullah Bahadur*[2]. In that case certain wakfs were created under two documents of the year 1846 and 1868 by which provision was made, amongst, other things for the members of the Mohamedan family and all their descendants and then for charitable purposes. Thereafter in the year 1881 there was a settlement among the members of the family to the effect that the wakfs were binding and that the allowances fixed thereunder should be paid out of the income of the properties to certain named members of the family and that upon the death of any of them, the payment should be made to his or her heirs in any proportion as might be fixed at a family panchayat. By a separate agreement the mutavalli also agreed that he and future mutavallis would pay the agreed allowances. For sometime these allowances were paid to the persons named and their heirs but later on the mutavalli objected to make payment of the allowances to the heirs of the persons named in the documents on the ground that it was contrary to the Mohammedan Law. The Privy Council held that the provision for the payment of these allowances constituted a charge upon the property.

1. A.I.R. 1939 Pat. 406.
2. (1922) L.R. 49 I.A. 153 : 43 M.L.J. 385 : I.L.R. 49 Cal. 820 (P.C.).

The argument on behalf of the Mutavalli was that the Wakfnamas were gifts and therefore invalid under Mohamedan Law, having regard to the provisions contained in the wakfnamas. But this argument was rejected by the Privy Council on the ground that it was not a gift simpliciter, but that it was an agreement made for valuable consideration and was not subject to the restrictions affecting gifts among Mohamedans. The law was stated in these terms at page 836 :

" By these agreements the members of the family other than Sir Abdul Gani and his son Ahsanullah surrendered their claims to property of considerable value and stayed their suit in consideration of a firm contract securing to them annuities to an amount exceeding Rs. 1,30,000 and continuing such annuities to their heirs. Such an agreement if made for valuable consideration is not subject to the restrictions affecting gifts among Mohamedans but is a contract creating a charge on lands, which may be enforced like other charges by the Courts. The provision contained in the agreements that the distribution of as annuity among the heirs of the annuitant should be in proportion to be determined by the family panchayat (if it was intended to do more than to authorise the panchayat to settle disputes as to heirship) may be disregarded the more so as no panchayat has functioned for many years past. The view is in accordance with the decision of the Board in *Umjad Ally Khan* v. *Mohamadee Begum*[1], *Lakshminarayana Ananga* v. *Madhava Deo*[2], *Khwaja Mohamed Khan* v. *Hassaini Begum*[3], and *Raja of Ramnad* v. *Sunderapandiyaswami*[4], and it appears to their lordships that it should prevail".

I may also refer to the decision in *Umjad Ally Khan* v. *Mohamdee Begum*[1]. The principle of which is applied by the Privy Council in *Khaja Solehman Quadir* v. *Salimullah Bahadur*[5], the decision already referred to. In that case an arrangement was entered into between a father and son as a result of which certain Government promissory notes negotiable securities, etc., were given to the son subject to the condition that during the father's lifetime the father will be entitled to the interest accruing from those notes, the same to be applied by him to certain religious and charitable purposes. This arrangement even though a life interest, as it were, was created in respect of the interests, from the bonds in favour of the father, was upheld on the ground that this arrangement was founded upon a valid consideration (Vide the observations at page 548).

A similar arrangement was upheld in the decision in *Mubarakunnissa* v. *Mansab Hasan Khan*[6], in which a Mohamedan male gave to his wife certain properties in lieu of her dower with condition that the wife was to enjoy the property for her lifetime, that the property was to revert to the husband if the wife predeceased him, and that if the husband predeceased the wife was to take the property absolutely.

It only remains, to refer to the decision of the Privy Council in *Syed Mohamed Raza* v. *Mst. Abbas Bibi*[7], which affirmed the decision in *Mst. Abbas Bandi Bibi* v. *Sayid Mohamed Raza*[8]. In that case a compromise was entered into between an intended husband and wife (Shia Mohamedans) by which certain properties were given to the wife subject to the condition that she shall not have power to alienate the properties to any stranger and that the properties shall devolve upon her legal heirs from generation to generation. The High Court took the view that the Shia law recognised the creation of a limited interest in succession and the creation of vested remainder to unborn persons. The High Court also upheld the settlement on the ground that a family settlement might be entered into subject to any conditions which might not be valid in the case of ordinary deeds under ordinary law, and that such conditions agreed to in a family arrangement would be valid and enforceable as between the parties thereto. The Privy Council left open the question as to whether the Shia law permitted the creation of successive life interests

1. (1867) 11 M.I.A. 517.
2. (1892) L.R. 20 I.A. 9 : I.L.R. 16 Mad. 268.
3. (1910) I.L.R. 32 All. 410.
4. (1918) L.R. 46 I.A. 64 : 36 M.L.J. 164 : I.L.R. 42 Mad. 581.
5. (1922) L.R. 49 I.A. 153 : 43 M.L.J. 385 : I.L.R. 49 Cal. 820. (P.C.)
6. (1911) I.L.R. 33 All. 421.
7. (1932) 63 M.L.J. 180: L.R. 59 I.A. 236 : I.L.R. 7 Luck. 257 (P.C.).
8. (1929) I.L.R. 4 Luck. 452.

and vested remainder. At the same time the restriction imposed under the document was not a deed of gift or conveyance by one of the parties to the other, but was in the nature of a contract between the parties thereto. Sir George Lowndes put the matter thus at page 185—

" On the assumption that Sughra Bibi took under the terms of the document in question an absolute estate subject only to this restriction, their Lordships think that the restriction was not absolute but partial; it forbids only alienation to strangers, leaving her free to make any transfer she pleases within the ambit of the family. The question therefore is whether such a partial restriction on alienation is so inconsistent with an otherwise absolute estate that it must be regarded as repugnant and merely void. On this question their Lordships think that *Raghunath Prasad Singh's case*[1], is of no assistance to the appellants, for there the restriction, against alienation was absolute and was attached to a gift by will. It is in their Lordships opinion important in the present case to bear in mind that the document under which the appellants claim was not a deed of gift, or a conveyance, by one of the parties to the other, but was in the nature of a contract between them as to the terms upon which the ladies were to take. The title to that which Sughra Bibi took was the dispute between her and Afzal Hussain. In compromise of their conflicting claims what was eventually a family arrangement was come to, by which it was agreed that she should take what she claimed upon certain conditions. One of these conditions was that she would not alienate the property outside the family. Their Lordships are asked by the appellants to say that this condition was not binding upon her; and that what she took she was free to transfer to them."

It is unnecessary to refer to the other decisions on the point. The arrangement in this case in a family settlement by which the 16th defendant agreed to take a life interest and after his lifetime the property would be taken by the 17th defendant. It is clear therefore that the settlement executed by the 16th defendant in favour of the plaintiffs is invalid, and cannot defeat the rights of the 17th defendant. The second appeal therefore fails and is dismissed with costs of the 17th defendant in all the Courts. No leave.

V.M.K. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

A. V. Ramachandra Naidu .. *Appellant**

v.

Hassina Bi and others .. *Respondents.*

Transfer of Property Act (IV of 1882), *sections* 58, 67 *and* 68—*Usufructuary mortgage with personal covenant to pay—Effect of such covenant—Composite or anomalous mortgage—Suit for sale for recovery of mortgage money—Maintainability of—Applicability of section* 9-A *of Madras Agriculturists Act (IV of* 1938) *in a suit for sale by mortgagee.*

Under the terms of the mortgage the covenant to pay is more pronounced. In the documents under consideration there is a dead line for payment and redemption. The penal clause may be invalid as a clog, but it brings out forcibly that the mortgage money becames due on a particular date. In the circumstances, following the decisions in *Mamoona Labbai* v. *Ramanatha Pillai*, (1946) 1 M.L.J. 90 and *Ahobala Sastriar* v. *Kalimuthu Pillai*, (1962) 1 M.L.J. 304, it was held that there is a personal covenant to pay entitling the mortgagee to bring a suit for sale. It is settled proposition of law that if a deed of mortgage contains a personal covenant to pay, there is a right of sale.

The mortgages under consideration here are not pure usufructuary mortgages. In the light of decisions of this Court their language warrants the inference that

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1. (1929) I.L.R. 4 Luck. 483.

* S.A. No. 1904 of 1962. 5th January, 1967.

the mortgage money does fall due showing also a covenant for payment. They are therefore composite or anomalous mortgages. This is a case of usufructuary mortgage where the mortgagor also binds himself personally to pay the mortgage money. It follows that the plaintiff would be entitled to a decree for sale.

The present is a suit for sale by the mortgagee. It may be that the mortgagors are entitled to relief in a proceeding where section 9-A of Madras Act IV of 1938 may be applied. But they cannot invoke it in a suit for sale.

Appeal against the decree of the District Court of North Arcot at Vellore in Appeal Suit No. 350 of 1961, preferred against the decree of the Court of the Subordinate Judge, Vellore in Original Suit No. 3 of 1959.

A. Sundaram Ayyar, for Appellant.

V. V. Raghavan, for Respondents.

The Court delivered the following

ORDER.—The plaintiff, the mortgagee in a suit for sale who has failed in both the Courts below, has preferred this second appeal. Defendants 1 to 4 are the legal representatives of the mortgagor one Abdul Rahim Sahib, the first defendant being the wife and defendants 2 to 4 being the children of the mortgagor. The 5th defendant has taken a deed of sale of the mortgaged properties from defendants 1 to 4 on 25th June, 1955. The claim for sale relates to two mortgages, both possessory in character, namely (1) Exhibit A-1 dated 2nd July, 1940, under which the mortgagor had borrowed a sum of Rs. 3,000 and (2) Exhibit A-2 dated 21st December, 1942, for a sum of Rs. 1,000. Under the terms of the deeds the amounts do not carry any interest and the mortgagee in lieu of interest was to hold and enjoy the properties.

The short question for consideration is whether on the terms of the documents a suit for sale for recovery of the mortgage moneys is maintainable. The plaintiff came to Court *inter alia* with the averment that the mortgagor failed to deliver possession of properties in terms of the deeds of mortgage, and that he had not been able to secure possession of the mortgaged properties subsequently. He pleaded:

> " Hence the plaintiff is entitled in law to sue to recover the mortgage money and interest and realise the same by sale. Besides, there is personal covenant to pay by the mortgagor in both the deeds " A " and " B ". "

The plaint averred that the cause of action for the suit arose on 2nd July, 1940, and on 21st December, 1942, when the two mortgages were executed and 2nd July, 1945 and 21st December, 1945, when the moneys became payable and the plaintiff prayed for a direction to the defendants to pay the plaintiff a sum of Rs. 5,300 and subsequent interest and costs in respect of the two mortgage deeds within a time to be fixed by the Court and in default for sale of the mortgage properties for realisation of the mortgage amounts. It is averred that the suit was not barred by limitation, as there was an acknowledgment of the mortgages in the sale deed dated 25th June, 1955, in favour of the 5th defendant. The plaint claim included a sum of Rs. 1,300 as and for interest on the two mortgages based on the averment in the plaint that under some arrangement the mortgagor himself continued in possession o the properties paying interest without surrendering possession to the mortgagee and that he did not pay interest from 1952. The Courts below have rejected the plaintiff's case that the mortgagor failed to deliver possession of the mortgage properties to him. This is a finding of fact not open to review in second appeal and naturally not the subject of any discussion before me.

The plaintiff has not put forward any case that while in possession of the properties he had been deprived of the same. He had rested his claim to the money on the personal covenant and on the ground that the mortgagor failed to deliver the mortgage properties to him. The tenability of the plaintiff's claim on the covenant was examined in the trial Court from the standpoint of his right to a

personal decree. A perusal of the judgments of the Courts below shows that it has been completely lost sight of that the claim is for a decree for sale. Reference is made by the trial Court only to section 68 of the Transfer of Property Act and it is stated that a usufructuary mortgagee has a right to sue for the mortgage money, if for instance, there is a personal covenant to repay the mortgage amount by the mortgagor, or as contemplated under sub-clause (4) of section 68 where the mortgagee being entitled to possession of the mortgaged property the mortgagor fails to deliver the same to him, or to secure possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor. It finds that neither under Exhibit A nor under Exhibit A-2 there is a personal covenant to pay. A decision of the Allahabad High Court in *Bisnan Datt Singh* v. *Mathur Prasad*[1], is referred to as authority. The learned Subordinate Judge states that Counsel for the plaintiff during the arguments represented that he was not pressing his client's case under the personal covenant, as the plaintiff's claim under the head would be barred by time. The learned Judge states that for the enforcement of a personal covenant the period of limitation is six years from the due date. Clearly in the context I do not understand learned Counsel as conceding that he had no case for a decree for sale on the personal covenant. Learned Counsel was obviously referring to a personal decree against the mortgagor. In the erroneous view that there was no personal covenant for payment in the mortgage deeds the other question, a claim to the mortgage money under section 68 (1) (*d*) only of the Transfer of Property Act, was taken up for consideration and was found against on the merits. The appellate Court proceeds to consider the claim only from the point of view of section 68 (1) (*d*), though the point set up for consideration is sufficiently wide, namely, whether the suit is maintainable ? As already indicated the plaintiff's case that possession of the mortgage properties was not delivered to him, was rejected on appeal also. In appeal also it is found that the claim for mortgage money is barred by limitation, as more than 12 years had elapsed from the date of mortgages.

At the outset it may be stated that if under the terms of the mortgage deeds the plaintiff can have a decree for sale no question of limitation can arise. If the plaintiff's construction of the deeds that there are covenants to pay is accepted then under the mortgage Exhibit A-1 dated 2nd July, 1940 the principal amount was payable on or before the 30th June, 1945 and under the mortgage Exhibit A-2 dated 21st December, 1942, the principal amount was payable on or before 21st December, 1945. The plaintiff who under Article 132 of the Limitation Act, 1908 had 12 years to bring the suit for sale from when the mortgage money became due, relied upon the acknowledgment of the mortgages under the registered sale deed Exhibit A-3 dated 25th June, 1955. The acknowledgment is within twelve years from when the moneys became due. The suit was instituted on 2nd January, 1959. So no question of limitation can arise, viewed as a suit for sale of the mortgage properties, which in fact it is.

Now to come to the construction of the documents, it is really regretable that the trial Court has gone to a decision of the Allahabad High Court when there are a catena of decisions of this Court covering the point. The terms of the mortgage Exhibit A-2 are practically indentical with the terms of Exhibit A-1 and it is sufficient to take up for consideration the document Exhibit A-1. Literally translated it is styled as a usufructuary mortgage debt deed for Rs. 3,000. After referring to the details of the consideration it is stated that it did not carry any interest and the mortgagee had to enjoy the proceeds of the land *in lieu* of interest. The mortgagor then covenants as follows :

"I shall pay the principal amount within a period of five years, that is, before the 30th June, 1945, at the end of any Ani, make the endorsement of payment and take return of the document. Should I fail to pay at the aforesaid time limit, this document shall be treated as a sale deed. I have delivered possession of the

1. A.I.R. 1939 All. 260.

properties described herein to you this day itself. I shall not pay the principal during the middle of the cultivation season. The payment shall be at the close of the season."

The wording of the crucial clause in Tamil is:

> அசல் துகையை 5 ஐந்து வருஷ வாயிதா அதாவது வருகிற 1945 ௵ ஜூன் மீ 30 உக்குள் எந்த ஆனி காலாவதியில் கொடுத்து பத்திரத்தில் செல்லெழுதி வாபஸ் பெற்றுக் கொள்ளுகிறேன்.

There is no dispute before me that the clause in the deed debarring the mortgagor for ever from redeeming the properties after the period fixed by providing that on the expiry of the period the transaction shall be treated as a sale, is a clog on redemption and invalid. Neither side relies on this clause. Can it be said that there is no covenant in this case by the mortgagor to repay the mortgage money? Did not the mortgage money become due under this mortgage on the 30th June, 1945? In *Kangaya Gurukal* v. *Kalimuthu Annavi*[1], a usufructuary mortgage contained covenant as herein under:

> "Thereafter on the 30th Panguni Bhava year on paying the aforesaid Rs. 200 we shall recover back our land. If on the date so fixed the amount be not paid and the land recovered back, in whatever year we may pay the Rs. 200 in full on the 30th Panguni of any year then you shall deliver back our lands to us."

The Full Bench referring to the first sentence in the extract from the mortgage set out above stated that it contained a promise by the mortgagor to pay on the date named. Referring to the second sentence, the Full Bench observed:

> "The second sentence of the extract provides that in the event of the mortgagor not paying on the due date, but subsequently, he may pay only on the corresponding day of future year, and there shall then be an obligation on the part of the mortgagee to give up the land."

The Full Bench held that the mortgage was combination of a simple and a usufructuary mortgage and the mortgagee was entitled to a decree for the mortgage money under clause (*a*) of section 68 of the Transfer of Property Act. Clearly under the terms of the mortgage now under consideration the covenant to pay is more pronounced. There is not even an option as in the aforesaid case to pay in any year after the date first fixed. In an earlier Full Bench case *Sivakami Ammal* v. *Gopala Savundaram Aiyan*[2], the mortgage contained a covenant that the mortgagor was to pay the mortgage amount on a certain date in 1883, and that if he failed to pay on the said date, the mortgagee was to receive the amount on the corresponding date of whatever year the mortgagor paid. The Full Bench held that clearly there was a covenant to pay and a suit for sale therefore lay. *Udayana Pillai* v. *Senthivelu Pillai*[3], is another case where similar language has been construed to contain a covenant to pay. In *Mamoona Labbai* v. *Ramanatha Pillai*[4], a decision of Rajamannar, J. (as he then was) the deed provided for the mortgagee to enjoy the property under othi for a period of six years from the date of the mortgage and there is a further clause that on the expiry of the stipulated period, the mortgagor shall pay the amount and redeem the othi. Following the decisions in *Kangaya Gurukal* v. *Kalimuthu Annavi*,[1] and *Udayana Pillai* v. *Senthivelu Pillai*[3], above referred to, the learned Judge held that there was a personal covenant to pay the othi amount, and that it could be implied that a date was fixed for payment. The contention that the provision is only for redemption on payment and does not import an obligation to pay, was not accepted. In *Ahobala Sastriar* v. *Kalimuthu Pillai*[5], Veeraswami, J., held that the recitals in a mortgage deed, "On the expiry of the three year period I shall pay the aforesaid principal amount and redeem the property scheduled hereunder" clearly amounted to a personal covenant to pay the debt entitling the mortgagee to bring a suit for

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1. (1904) 14 M.L.J. 61 : (1904) I.L.R. 27 Mad. 526 at 527.
2. (1894) 4 M.L.J. 50 : (1894) I.L.R. 17 Mad. 131.
3. (1896) 6 M.L.J. 210 : (1896) I.L.R. 19 Mad. 411.
4. (1946) 1 M.L.J. 90.
5. (1962) 1 M.L.J. 304.

sale of the mortgaged property. The decision in *Mamoona Labbai* v. *Ramanatha Pillai*[1] was followed.

Learned Counsel for the defendants relied principally on the decisions of this Court in *Palaniappa Chettiar* v. *Periaswami Konar*[2], and *Rengayya Pillai* v. *Narasimha Iyengar*[3]. In the former case the deed of usufructuary mortgage stated :

> " In any year after giving you notice in Panguni and after paying your money in Chitrai, I shall redeem the properties."

On the recitals extracted above, the learned Judges held that there was no enforceable covenant to pay and a suit for sale of the mortgage property was unsustainable. In addition, the mortgage deed contained a term that the mortgagee was to enter upon the properties and enjoy the name under the right of usufructuary mortgage for a period of seven years from the date of the mortgage. Its effect, as pointed out by the learned Judges (Leach, C.J. and Krishnaswami Aiyangar, J.) was that the mortgagee was to have the right of enjoying the property undisturbed for a period of seven years certain. During that period, the mortgagor was not to have the right to redeem. After the expiry of the period the mortgagor could, if he chose, redeem in any subsequent year but he must give notice in Panguni and pay money in Chitrai for redemption. The learned Judges observed that there were no words in the deed casting an obligation on the mortgagor to pay and redeem, capable of being enforced at the instance of the mortgagee. There is nothing comparable or similar in the document in the present case. Rajamannar, J. (as he then was) in *Mamoona Labbai* v. *Ramanatha Pillai*[1], distinguished *Palaniappa Chettiar* v. *Periaswami Konar*[2], observing thus :

> " Two features which distinguish the language used in the document construed in that case from the language used in the document in the present case may be noted. The first is that that there is an option to pay in any year, and secondly the main idea of the clause is that the mortgagor is at liberty to redeem after the expiry of the stipulated period, and as a condition of redemption to the issue of notice in a particular month and payment in another month are specified."

The language of the mortgage instrument construed in *Rangayya Pillai* v. *Narasimha Iyengar*[3], resembles the language of the instrument in *Palaniappa Chettiar* v. *Periaswami Konar*[2]. It ran thus :

> " at whatever cultivation season in the month of Chitrai in any year after the stipulated period of ten years, I may pay the principal amount, you shall at that time receive the amount."

Then holding that there is nothing in the deed to suggest that there is any personal covenant, the learned Judges (Philips, J., and Krishnan, J.) observed:

> "This stipulation as to payment is one entirely for the benefit of the mortgagor. For it allows him to choose his own time for payment if he wishes to pay. To construe this as a personal covenant to pay at the end of ten years which the mortgagee could enforce at once would be to destroy the whole benefit of the stipulation so far as the mortgagor is concerned."

Learned Counsel for the respondents pressed that in effect and substance the recitals in the mortgages construed in *Sivakami Ammal* v. *Gopala Savundaram Aiyan*[4], *Udayana Pillai* v. *Senthivelu Pillai*[5] and *Kangaya Gurukkal* v. *Kalimuthu Annavi*[6], are similar to the recitals in *Rangayya Pillai* v. *Narasimha Iyengar*[3], and *Planiappa Chettiar* v. *Periaswami Konar*[2]. Learned Counsel would point out that in the former cases also there was a provision against the redemption before a particular period. The clause providing for payment were not in recognition of any obligation to pay, but related only to the

1. (1946) 1 M.L.J. 90.
2. (1941) 2 M.L.J. 447.
3. (1918) M.W.N. 672.
4. (1894) 4 M.L.J. 50 : (1894) I.L.R. 17 Mad. 131.
5. (1896) 6 M.L.J. 210 : (1896) I.L.R. 19 Mad. 411.
6. (1904) 14 M.L.J. 61 : (1904) I.L.R. 27 Mad. 526.

period of redemption and the time for redemption in any particular year. After the period fixed for redemption the mortgagor is left with an option to choose the year of payment and the time for redemption is fixed having regard to the convenience of the mortgagee that there may be no interference, with his enjoyment during the agricultural season. Under the definition of a usufructuary mortgage the mortgagor should deliver possession of the mortgaged property to the mortgagee and authorise him to retain such possession until payment of the mortgage money. The recitals in some usufructuary mortgage deeds regarding payment and redemption, according to learned Counsel express only that feature of a usufructuary mortgage. It is contended that the language expressing a covenant against payment and redemption within a particular period or offering to redeem on a particular date or after a particular period should not be construed as a covenant to pay the mortgage money that is only postponing redemption, and may in a given case govern the starting point for limitation under Article 148 of the Limitation Act of 1908. There is much to be said for this argument and if I have to construe in the present case similar language, I would have shared with Veeraswami, J., the difficulty the learned Judge expressed in *Thirumani Chettiar* v. *Veluswami Naicker*[1], in implying a covenant to repay in such recitals while feeling bound by the decisions. The documents now under consideration do not give much difficulty and the recitals are in their purport, substance and in effect the same as found in *Mamoona Labbai* v. *Ramanatha Pillai*[2], and *Ahobala Sastriar* v. *Kalimuthu Pillai*[3]. Moreover in the documents now under consideration there is indeed the time for payment and redemption. The penal clause may be invalid as a clog, but it brings out forcibly that the mortgage money becomes due on a particular date. In the circumstances following the said two decisions I hold that there is in- personal covenant to pay entitling the mortgagee to bring a suit for sale. It is settled proposition of law that if a deed of mortgage contains a personal covenant to pay, there is a right of sale. Section 67 of the Transfer of Property Act entitles a mortgagee, in the absence of a contract to the contrary at any time after the mortgage money has become due to him and before a decree has been made for the redemption of the mortgaged property, or the mortgage money has been paid or deposited as provided in the Act, a right to obtain from the Court a decree that the property be sold. No doubt section 67 clause (*a*) provides that nothing in that section shall be deemed to authorize a usufructuary mortgagee as such to institute a suit for sale. But the mortgages under consideration here are not pure usufructuary mortgages. In the light of decisions of this Court their language warrants the inference that the mortgage money does fall due showing also a covenant for payment. They are therefore composite or anomalous mortgages. This is a case of usufructuary mortgage where the mortgagor also binds himself personally to pay the mortgage money. It follows that the plaintiff would be entitled to a decree for sale.

The defendants plead that they are agriculturists entitled to relief under section 9-A of Madras Act IV of 1938. But this Court has in a series of decisions held that having regard to the scheme of the Act section 9-A is only intended to apply when the mortgagor seeks to redeem the mortgage. The present is a suit for sale by the mortgagee. It may be that the mortgagors are entitled to relief in a proceeding where section 9-A may be applied. But they cannot invoke it is a suit for sale. The present claim includes the principal sum of Rs. 4,000 due under the mortgages and a sum of Rs. 1,300 as interest. Under the mortgage deeds the plaintiff in not entitled to any interest and there is nothing in the plaint to warrant awarding interest in this case. The decree in the circumstances can only be for the principal amounts totalling Rs. 4,000; under the two deeds.

In the result the second appeal is allowed and the judgments and decrees of the Courts below are set aside. The plaintiff is entitled to a mortgage decree for sale. There will be a preliminary decree in favour of the plaintiff for a sum of

1. (1964) 77 L.W. 666.
2. (1946) 1 M.L.J. 90.
3. (1962) 1 M.L.J. 304.

Rs. 4,000, the principal amount due under the mortgages. The defendants will have a period of four months from this date for payment.

Coming to the question of costs, from the judgments of the Courts below it does not appear that decisions of this Court which have a direct bearing on the case have been placed before the Courts. In my view, this is a circumstance which cannot be overlooked in awarding costs. The plaintiff is entitled to his proportionate costs in the trial Court against all the defendants. The defendants will be entitled to proportionate costs on the interest disallowed. The plaintiff had substantial reasons for not accepting the sum of Rs. 4,000 tendered by the 5th defendant. He has been challenging the alienation in favour of the 5th defendant as sham and intended to defeat his rights as decreeholder. In fact he has succeeded and it has been held that the 5th defendant has no title to the suit properties. But this adjudication was after the institution of the suit. Having regard to the circumstances of the case, I disallow costs in the lower appellate Court and award plaintiff proportionate costs in this Court against defendants 1 to 4. Defendants 1 to 4 will be entitled to their proportionate costs on the value of the claim disallowed.

No leave. *Appeal allowed.*

S.V.J.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE T. VENKATADRI.

A. Thiruvengadaswamy Naidu .. *Petitioner**

v.

C.T Nachiappan, minor through his father and guardian V. P. C. T. Chidambaram Chettiar and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960)—Purchase of property during the pendency of an eviction proceeding for wilful default in payment of rent—Purchaser, if could be impleaded as a party to the proceeding.

On the question whether a person who purchases the property during the pendency of an eviction proceeding for wilful default in the payment of rent can be impleaded as a party to the proceeding, it was held that whenever there is a personal need or requirement of the landlord such as owners' occupation, his legal representatives can continue the proceeding, and if there is any right or interest involved in the property then his legal representatives or successors-in-interest are also entitled to continue the proceeding initiated by the landlord under the provisions of the Rent Control Act.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Munsif, Madurai in C.R.P. No. 805 of 1964 I.A. No. 212 of 1964 in R.C.A. No. 70 of 1964, Sub-Court, Madurai.

A. Sundaram Aiyar, for Petitioner.

K. Parasaram, for Respondent.

The Court made the following

ORDER.—The important question of law that arises in this civil revision petition is whether a person who purchases the property during the pendency of an eviction proceeding for wilful default in the payment of rent can be impleaded as a party to the proceeding.

On the application by the vendee, the learned Subordinate Judge, Madurai, impleaded him as a party. In revision, the learned District Judge, Madurai, confirmed that order. Aggrieved by the order of the District Judge, the tenant has come up in revision to this Court.

* C.R.P. No. 2540 of 1965. 9th February, 1967.

Mr. A. Sundaram Aiyar, learned Counsel for the petitioner-tenant, contends that the application to bring on record the purchaser of the property as a party to the proceeding is not maintainable as the provisions of the Civil Procedure Code are not applicable to rent control proceedings.

In *Muhammad Ibrahim* v. *Rahiman Khan*[1], this Court held that an order of the Rent Controller directing the tenant to put the landlord in possession of his house on the ground that the landlord desired to occupy the house himself was one for the personal benefit of the landlord, and was not capable of execution after the death of the landlord at the instance of his legal representatives. In *Shah Dhanaraj Kantilal* v. *Additional Judge, Small Cause Court, Madras*[2], a Bench of this Court observed that, after the death of a landlord, who had applied for eviction on account of the tenant's default, the landlord's son was the landlord and it could not be said that the deceased landlord's son could not claim the benefit of the default which occurred during the lifetime of his father. In *Shanmugham* v. *Satyanarayana Prasad*[3], Ramachandra Iyer, C.J., has observed, that, when a landlord obtains an order for delivery of possession on the ground of demolition and reconstruction but sells the property, the order for eviction cannot be deemd to lapse, and the executing Court is bound to execute the order at the instance of the successor-in-interest of the landlord.

From the trend of opinion, it seems to me to be clear that whenever there is a personal need or requirement of the landlord such as owner's occupation, his legal representatives can continue the proceeding, and that if there is any right or interest involved in the property then his legal representatives or successor-in-interest are also entitled to continue the proceeding initiated by the landlord under the provisions of the Rent Control Act.

The Civil Revision Petition is accordingly dismissed but without costs.

V.M.K. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. VENKATARAMAN.

Veera Gounder and others .. *Petitioners**

v.

V. Ramaswamy Gounder and another .. *Respondents.*

Madras Panchayat Act (*XXXV of* 1958), *section* 12 *and Election Rules framed thereunder, rules* 11 (*c*) *and* 12—*Election of three candidates from a Panchayat ward—Reception of the nomination of one of them improper—If materially affects the election of others—Election petitioner to show that the votes wasted on the returned* (*ineligible*) *candidate would have gone to defeat them—Election petitioner when can be declared elected.*

Constitution of India (1950), *Article* 227—*Jurisdiction to correct error apparent on the face of record.*

Three persons K. V. and P. K. were elected as members of Veera Gounder Panchayat, Ward No. 1. Three others who contested the election, secured less number of votes, one R. securing more votes than the other two. In the election petition by R., the Election Court held that the acceptance of the nomination of K. by the Returning Officer was improper. It further held that the result of the election of all the three returned candidates had been materially effected by the improper reception of the nomination paper of K. The reasoning of the Court was that it could not be predicated that the wasted votes cast in favour of K. would have been cast in favour of one or the other of the contesting candidates and therefore the whole election was void. For the same reason R, the election petitioner also could not be declared elected.

1. (1947) 2 M.L.J. 419.
2. (1949) 2 M.L.J. 28 (N.R.C.).
3. I.L.R. (1964) 2 Mad. 354 : (1964) 2 M.L.J. 96.

* C.R.P. No. 1857 of 1966. 3rd August, 1967.

Rule 11 (*c*) of the Madras Panchayat Act (XXXV of 1958), *inter alia* provided that if in the opinion of the election Court the result of the election has been materially affected by any irregularity in respect of a nomination paper or by the improper reception or refusal of a nomination paper or votes or by the non-compliance with the provisions of the Act and the rules made thereunder, the election of such returned candidate shall be void.

Under rule 11 (*c*) of the Election Rules it is necessary for the election petitioner to prove that the improper reception of the nomination of *K* and his want of qualification under section 22 of the Act materially affected the election of the other two returned candidates. In order to show that the result of the election was materially affected regarding *V* and *P.K.*, the election petitioner should have shown that the votes wasted on *K.* would, if he had not contested, been so distributed to the other contesting candidates as to bring about the defeat of *V.* and *P.K.* In the absence of such proof, there was no justification for setting aside the election of the two returned candidates.

The election petitioner *R*, cannot be declared elected, because, in the first place, he has not filed any petition challenging that portion of the order of the Election Court, declining to declare him elected and secondly, he has not shown that the votes wasted on *K* would have come to him to an extent to make him successful as between him and the other two who got less number of votes.

There being an error of law apparent on the face of the record, jurisdiction of the High Court under Article 227 of the Constitution of India could be invoked to correct such error.

Vashist Narain Sharma v. *Dev chandra* (1954) S.C.J. 717 : (1954) 2 M.L.J. 379 : (1954) 10 E.L.R. 30 : (1955) 1 S.C.R. 509 : A.I.R. 1954 S.C. 513, followed.

Petitions under Article 227 of the Constitution, praying the High Court to revise the order of the Election Court (Prinicipal District Munsif), Salem in Election O.P. No. 14 of 1965.

P. R. Gokulakrishnan and *R. Balasubramanian*, for Petitioners.

N. C. Raghavachari and *N. S. Varadachari*, for Respondents.

The Court delivered the following

JUDGMENT.—This petition has been filed under Article 227 of the Constitution by three persons, Veera Gounder, Kandaswami and Karuppan Chetti. They were elected as members of Veera Gounder, Panchayat, Ward No. 1, in the election held on 2nd February, 1965. Three other persons, namely, Ramaswami Gounder, Annamalai and Govindan, also contested the election. But they secured less number of votes. The number of votes secured by the candidates is as follows :

Karuppan Chetti ..	127
Veera Gounder ..	119
P. Kandaswami ..	119
Ramaswami Gounder ..	78
Govindan ..	71
Annamalai ..	70

Ramaswami Gounder filed an election petition before the Principal District Munsif, Salem, who was the Election Court constituted by the rules framed under the Madras Panchayat Act (XXXV of 1958) by Notification No. 10. The election was challenged on the ground that Karuppan Chetti's name had been deleted in 1963 itself from the electoral roll and therefore, under section 22 of the Act, he was not qualified to stand for election at all and his nomination paper should have been rejected. It was alleged that the Returning Officer had before him only the original list of voters in which the name of Karuppan Chetti found place, but did not have with him the list of electors published in 1963, according to which

the name of Karuppan Chetti was ordered to be deleted by the Revenue Divisional Officer. It was alleged that the result of the election was materially affected by the improper reception of the nomination paper and by non-compliance with section 22 of the Act. It is here necessary to quote rule 11 (c) so far as, is relevant:

" If in the opinion of the Election Court (c) the result of the election has been materially affected by any irregularity in respect of a nomination paper or by the improper reception or refusal of a nomination paper or vote or by the non-compliance with the provisions of the Act and the rules made thereunder, the election of such returned candidate shall be void."

The petitioner wanted that the election of the three returned candidates should be declared void on the above ground; in addition he wanted a declaration that he must be deemed to have been elected. Rule 12 is on these lines.

" 12. (1) At the conclusion of the enquiry the Election Court shall declare whether the election of the returned candidate or candidates is void under rule 11.

(2) If the Election Court declares the election of the returned candidate or candidates void, it shall further pass an order either:

(a) declaring that any other party to the petition who has under these rules claimed the seat has been duly elected, or (b) ordering a fresh election.

(3) The order of the Election Court under sub-rule (1) and (2) shall be final."

In the election petition, the three returned candidates figured as respondents 1, 2 and 3 in the following order. Veera Gounder, Kandaswami and Karuppan Chetti. The other two, Annamalai and Govindan figured as respondents 4 and 5. The election petition was contested by the returned candidates. The Election Court held that the Karuppan Chetti's name had been ordered to be deleted in 1963 by the Revenue Divisional Officer, that he was therefore not qualified under section 22 of the Act to stand for the election, that the Returning Officer did not have before him the list of deletions and that the acceptance of the nomination of Karuppan Chetti was improper, though no objection was taken before him at the time of the scrutiny of the nominations. The Election Court further held that the result of the election of all the three returned candidates had been materially affected by the improper reception of the nomination paper of Karuppan Chetti. His point was that it could not be predicated that the wasted votes, namely 127, cast in favour of Karuppan Chetti, would have been cast in favour of one or the other of the contesting candidates and therefore the only course open to him was to declare the whole election void. On the same reasoning, he declined to declare the election petitioner, Ramaswami Gounder, elected.

This petition has been filed by the three returned candidates whose election has been set aside. Sri R. Balasubramaniam, learned Counsel for the petitioners before me, does not challenge the finding of the Election Court that Karuppan Chetti's name had been deleted in 1963 and that he was not therefore qualified. He concedes therefore that he could not seriously challenge the finding of the Election Court setting aside the election of Karuppan Chetti. But he submits that there was no justification for setting aside the election of the other two returned candidates. His argument is that under rule 11 (c) quoted above, it was necessary for the election petitioner to show that the result of the election of the other two returned candidates, Veera Gounder and P. Kandaswami, was also materially affected by the improper reception of the nomination paper of K. Karuppan Chettiar or by non-compliance with section 22 of the Act relating to K. Karuppan Chetti. He submits that in order to show that the result of the election was materially affected regarding Veera Gounder and Kandaswami, the election petitioner should have shown that the 127 votes, which were wasted on Karuppan Chetti would, if he had not contested, been so distributed to the other contesting candidates as to bring

about the defeat of Veera Gounder and Kandaswami. The learned Counsel urges that the election petitioner made no such attempt and that consequently, he could not succeed in setting aside, the election of Veera Gounder and Kandaswami.

In support of his contention, learned Counsel relies on the decision of the Supreme Court in *Vashist Narain Sharma* v. *Dev Chandra*[1], *Seewalal* v. *P. K. Choudry*[2]. In *Vashist Narain Sharma* v. *Dev Chandra*[1], there was only one member who had to be elected. The votes polled by the five contesting candidates were as follows :—

1.	Vashist Narain Sharma	..	12 868
2.	Vereshwar Nath Rai	..	10,996
3.	Mahadeo	..	3,950
4.	Dudh Nath	..	1,983
5.	Gulabchand	..	1,768

Three electors filed an election petition to declare the election of Vashist Narain Sharma void on the ground that the nomination of Dudh Nath (No. 4) was improperly accepted by the election officer. It was found that his nomination has been improperly accepted because he filed his nomination under a false name. But it was held that it was not proved by the election petitioners that the result of the election had been materially affected by the improper acceptance of the nomination. Their Lordships envisaged three possible situations :

(1) Where the candidate, whose nomination was improperly accepted has secured less votes than the difference between the returned candidate and the candidate securing the next highest number of votes; (2) where the person referred to above secured more votes (than the said difference); and (3) where the person whose nomination had been improperly accepted was the returned candidate himself. Their Lordships point out that in the first case, the result is not affected at all because, even if the votes wasted on the candidate whose nomination was improperly accepted, are entirely added to the second highest candidate, it would make no difference to the result, and the returned candidate would retain the seat. Again, in the third case, there can be no doubt that the result has been materially affected by the improper acceptance of the nomination of the returned candidate. So far as the case is concerned, their Lordships observe thus :

> "But we are not prepared to hold that the mere fact that the wasted votes are greater than the margin of votes between the returned candidate and candidate securing the next highest number of votes must lead to the necessary inference that the result of the election has been materially affected. That is a matter which has to be proved and the onus of proving it lies upon the petitioner. It will not do merely to say that all or a majority of the wasted votes might have gone to the next highest candidate. The casting of votes at an election depends upon a variety of factors and it is not possible for any one to predicate how many or which proportion of the votes will go to one or the other of the candidates. While it must be recognised that the petitioner in such a case is confronted with a difficult situation, it is not possible to relieve him of the duty imposed upon him by section 100 (1) (*c*) and hold without evidence that the duty has been discharged. Should the petitioner fail to adduce satisfactory evidence to enable the Court to find in his favour on this point, the inevitable result would be that the Tribunal would not interfere in his favour and would allow the election to stand."

In *Seewalal* v. *P. K. Chowdry and others*[2], there were five contesting candidates. The votes secured by them at the election were as follows :

P. K. Chowdry	..	5,308
Seewalal	..	4,074
Amarchand	..	3,908
Nilapchand	..	1,500
Narain Singh	..	719

1. (1954) S.C.J. 717 : (1954) 2 M.L.J. 379 : A.I.R. 1954 S.C. 513. (1954) 10 E.L.R. 30 : (1955) 1 S.C.R. 509 : 2. (1960) 21 E.L.R. 137.

P. K. Chowdry was declared elected, Seewalal, next to him, filed an election petition alleging that Amarchand was disqualified to contest the election for the reason that he was a Government contractor and that the result of the election had been materially affected by the improper acceptance of Amarchand's nomination paper. The election petition was dismissed. Seewalal filed on appeal which came up before the Madhya Pradesh High Court. The learned Judges, following the Supreme Court decision in *Vashist Narain Sharma* v. *Dev Chandra*[1], observed that the burden lay on Seewalal to establish that the result of the election had been materially affected by the improper acceptance of Amarchand's nomination paper in other words, it was incumbent on him to show that more than 1,234 votes (which was the difference between him and the votes of P. K. Chowdry) would have gone to Seewalal out of the 3,908 votes polled by Amarchand. The learned Judges examined the evidence tendered by the Seewalal on this aspect and held that the evidence was not sufficient to discharge the burden.

Two other cases where the test propounded by the Supreme Court was applied may be mentioned, namely, *Devasharan Singh* v. *Sheo Mahadev Prasad and others*[2], and *Ratan Shukla* v. *Dr. Brinjendra Swarup and others*[3].

It seems to me that the contention of the learned Counsel must be accepted so far as Veera Gounder and Kandaswami are concerned, the wording of rule 11 (*c*) of the Election rules framed under the Madras Panchayats Act (XXXV of 1958) is such that the principles laid down in the above decisions will clearly apply and it is necessary for the election petitioner to prove that the improper reception of the nomination of Karuppan Chetti and his want of qualification under section 22 of the Act materially affected the election of the other two returned candidates Veera Gounder and Kandaswami. The rule contemplates that the petitioner should have the election of each of the returned candidates to be void. Emphasis may be made on the use of the words " the return of such returned candidates shall be void." Merely because the election of Karuppan Chetti has to be set aside, it would not automatically follow that the election of the other two has to be set aside, unless it is proved that their election has been materially affected by the improper reception of the nomination of Karuppan Chetti and his want of qualification under section 22 of the Act. Here it is not contended by Sri N. C. Raghavachari, for the respondents, that any attempt was made by the election petitioner to show that the result of the improper reception of the nomination of Karuppan Chetti and his want of qualification has materially affected the result regarding Veera Gounder and Kandaswami. The Election Court has in setting aside, their election merely said

> " It cannot be said at this stage that if the third respondent was not allowed to contest the election, how and in what proportion the voters polled in his favour would have been divided among the other contesting candidates. Therefore, in my opinion because of the improper acceptance of the nomination of the third respondent for the election of Ward No. 1 of Veera Gounder Panchayat, the result of the election had been materially affected."

But, it is precisely this reasoning which has been condemned by their Lordships of the Supreme Court, because they say:

> " It will not do merely to say that all or a majority of the wasted votes might have gone to the next highest candidate."

Mr. N. C. Raghavachari, learned Counsel for the respondents, however, relies on two other decisions of the Supreme Court to justify the order of the Election Court. The first is *Durga Shankar* v. *Thakur Raghuraj Singh*[4], and the other is *Surendra Nath Khosla and another* v. *Dalip Singh and others*[5]. It must be observed at the outest

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1. (1954) S.C.J. 717 : (1954) 2 M.L.J. 379 : (1954) 10 E.L.R. 30 : (1955) 1 S.C.R. 509 : A.I.R. 1954 S.C. 513.
2. (1954) 10 E.L.R. 461.
3. (1955) 11 E.L.R. 332.
4. (1954) S.C.J. 723: (1954) 2 M.L.J. 385: (1954) 9 E.L.R. 494: (1955) S.C.R. 267.
5. (1957) S.C.J. 162 : (1957) S.C.R. 179 : (1956) 12 E.L.R. 370.

that the Act which their Lordships had to apply in these cases was the Representation of the People Act, 1951, as it stood before its amendment by Act XXVII of 1956. Section 100 as it originally stood, so far as material ran thus :

> " Section 100 (1) : If the Tribunal is of opinion—(*c*) that the result of the election has been materially affected by the improper acceptance or rejection of any nomination; the Tribunal shall declare the election to be wholly void."

Sub-section (2) stated :—

> " Subject to the provisions of the sub-section 3, if the Tribunal is of opinion—(*c*) that the result of the election has been materially affected by the improper reception or refusal of a vote or by the reception of any vote which is void, or by any non-compliance with the provisions of the Constitution or of this Act or of any rules or order made under this Act or any other Act or rules relating to the election, or by any mistake in the use of any prescribed form, the Tribunal shall declare the election of the returned candidate to be void."

Thus in the old Act, section 100 (1) contemplated contingencies where the Tribunal had to declare the election to be wholly void, and section 100 (2) contemplated contingencies where the Tribunal had to declare the election of the returned candidates alone to be void. As a result of the amendment by the Act of 1955 this distinction was swept away and section 100 (1) (*c*) and (*d*) (i) to (iv) read thus :

> " Section 100 (1).—Subject to the provisions of sub-section (2) if the Tribunal is of opinion (*c*) that any nomination has been improperly rejected or ;
>
> (*d*) that the result of the election in so far as it concerns a returned candidate, has been materially affected :—
>
> (*e*) etc:—(i) by the improper acceptance of any nomination, or
>
> (ii) by any corrupt practice committed in the interest of the returned candidate by a person other than that candidate or his election agent or a person acting with the consent of such candidate or election agent or
>
> (iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or
>
> (iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act,
>
> The Tribunal shall declare the election of the returned candidate to be void."

Now, there is no provision for declaring the election to be wholly void where there are two or more returned candidates. In *Durga Shankar Mehta* v. *Thakur Raghuraj Singh and others*[1] it was a double member constituency one a general constituency and the other reserved for the scheduled tribes. The appellant Durga Shankar was declared elected for the general seat, having secured 18,267 votes. Vasant Rao (respondent 2) was declared elected for the reserved seat having secured 14,442 votes. At the time of the nomination, he was under 25 years and was consequently not qualified to stand for the election under Article 173 of the Constitution. But this objection was not taken before the Returning Officer. It was taken at the time of the election petition and was found to be established. The election of Vasant Rao was therefore clearly void. But the further question arose whether the election of Durga Shankar had to be declared void. The decision on that turned on the question whether it was the provisions of section 100 (1) (*c*) of the old Act applied or section 100 (2) (*c*). If section 100 (1)(*c*) applied, the Tribunal had to declare the election to be wholly void, which meant that the appellant's election also had to be declared void. But if it was section 100 (2) (*c*) which applied, that would vitiate only the election of Vasant Rao and not of the appellant. On behalf of the appellant it was contended that because no objection was taken before the Returning Officer that Vasant Rao was below 25 years of age and his name actually found place in the Voter List, the Returning Officer was justified in accepting his nomination and it could not be said to be a case of improper acceptance of Vasant Rao's nomination and

1. (1954) S.C.J. 783 : (1954) 2 M.L.J. 385 : (1955) 1 S.C.R. 267 : (1954) 9 E.L.R. 494.

that the case would only be non-compliance with the provisions of the Constitution Their Lordships accepted that submission and held that consequently section 100 (1) (*c*) did not apply and section 100 (2) (*c*) applied. In that view, the election of the appellant was upheld. Mr. N. C. Raghavachari presses this decision into his service in this case on the ground that here also there was only want of qualification of Karuppan Chetti under section 22 of the Act and it was not a case of improper acceptance of his nomination. But this case is of no assistance to him, because the wording of rule 11 (*c*) of the rules under the Madras Panchayats Act already quoted. Rule 11 (*c*) makes it incumbent on the election petitioner to prove that the result of the election has been materially affected not merely in the case of improper reception of the nomination paper but also in the case of non-compliance with the provisions of the Act.

In *Surendranath Khosla and another* v. *Dalip Singh and others*[1], it was a double member constituency, one was a general seat and the other was a reserved seat. The first appellant, Surendranath Khosla, secured theh ighest number of votes, 13,853 in the general seat and the second appellant Pritam Singh secured the highest number of votes in the reserved seat 13,663. One Buta Singh had also filed his nomination for the general seat, but it had been improperly rejected. Hence, the Tribunal acting under the provisions of the then section 100 (*c*) of the Act, declared the election to be wholly void. It was contended before their Lordships that the election of the second respondent-appellant should not have been set aside, but their Lordships repelled this contention observing that the Tribunal had to declare the election to be wholly void. The election in that case was in respect of a double member constituency and was an integral one, and if it had to be declared void, the Tribunal was justified in setting aside the election as a whole. As I have already pointed out, this conclusion was based on the language of section 100 (1) (*c*) of the Representation of the People Act as it then stood. Now even the Representation of the People Act has been amended and similarly rule 11 (*c*) of the rules under the Madras Panchayats Act contains no provision for declaring the election to be wholly void. Therefore, the above decision cannot apply.

Sri N.C. Raghavachari, however, seeks to justify the act of the Election Court under rule 12 (*b*) of the rules, namely, that it could order fresh election. But this rule has to be read along with rule 11, and if, on a true construction of rule 11, the election of Veera Gounder and Kandaswami is not liable to be set aside for want of proof of the result of the election having been materially affected in their case rule 12 cannot be invoked by the election petitioner. Rule 12 can only mean that the Election Court could have ordered fresh elections only in the case of Karuppan Chetti.

Mr. N. C. Raghavachari then contended that the jurisdiction of this Court under Article 227 of the Constitution could not be invoked to correct the error which might have been committed by the Election Court in this case, and in support of this contention, he relied on a decision of the Supreme Court in *Satyanarayana* v. *Mallikarjun*[2]. That was a case where their Lordships held that the error of law, even if there was any, was not apparent on the face of the record and therefore, the High Court was not justified in exercising their power under section 115, Civil Procedure Code or under Article 227. Here however, the error of the Tribunal (Election Court) is apparent on the face of the record.

Sri N.C. Raghavachari then urged that his client, the election petitioner, should be declared elected on the place of Karuppan Chetti. But this cannot be done, because in the first place, he has not filed any petition challenging the portion of the order of the Election Court declining to declare him elected and secondly, he has not shown that the 127 votes wasted on Karuppan Chetti would have come to him to an extent to make him successful as between him and the other two respondents, Annamalai and Govidaswami.

In the result, I confirm the order of the Election Court setting aside the election of Karuppan Chetti, but set aside the order of the Election Court in respect of Veera

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1. (1957) S.C.J. 162: (1956) 12 E.L.R. 370: (1957) S.C.R. 179: A.I.R. 1957 S.C. 242.
2. A.I.R. 1960 S.C. 137.

Gounder and Kandaswami. Their election is upheld. Fresh elections will take place in respect of the vacancy caused by the setting aside of the election of Karuppan Chetti. No costs.

V.M.K. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

Samba Nataraja Dikshitar .. *Appellant**

v.

Kalyanasabesa Dikshitar, the present Secretary to the Podu Dikshitars of Sri Sabhanayagar Devasthanam .. *Respondent.*

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), *sections* 49 *and* 93*—Bar of jurisdiction of civil Court—Auction sale of rights of* Podu Deekshidar *of a temple for not paying fines imposed for failure to keep* Kaval Morai *as required by a resolution—Resolution, however, not validly passed—Civil suit by* Podu Deekshidar *for a declaration of his rights and for injunction—Maintainability—Civil Procedure Code (V of* 1908), *section* 9.

Civil Procedure Code (V of 1908), *section* 35 (2)*—Scope.*

When a plea is put forward that in any matter the jurisdiction of a civil Court to entertain a suit is barred the question has to be examined bearing in mind the general presumption in favour of the jurisdiction of the civil Court. It has been repeatedly pointed out that proper tribunals for determination of disputes as to rights and properties are Courts and a person's right to resort to a civil Court should not be whittled down unless it is expressly or by necessary implication barred by a statute.

The plaintiff, one of the *Podu Deekshidars* of Sri Sabanayakar temple, Chidambaram, filed a suit for a declaration that he is entitled to all the duties of his office in the above temple and to receive the emoluments thereof and for a permanent injunction restraining the secretary to the *Podu Deekshidars* of the temple and others from interfering with his performance of the duties of his office. The cause of action for the suit arose when on the failure of the plaintiff to keep a newly introduced *Kaval Morai* (temple watch turn) he was fined and on failure to pay the fine amount the next day his rights in the temple as *Podu Deekshidar* was auctioned away and sold to another *Podu Deekshidar.* On the question whether the civil Court had jurisdiction to entertain the suit and whether the suit should be decreed.

Held: The civil Court had jurisdiction to entertain the suit. It was not barred either by the rules governing the *Podu Deekshidars* or by section 49 read with section 93 of the Madras Hindu Religious and Charitable Endowments Act (XIX of 1951).

The resolution introducing the new *Kaval Morai* had not been validly passed by the general body and would not therefore be bindlng on the plaintiff and on the basis of the invalid resolution the plaintiff cannot be punished for not discharging the duties of *Kaval Morai.* In such circumstances it cannot be said that the trustee of the temple has exercised a disciplinary jurisdiction which he has in the matter. So the impugned Act does not fall under section 49 of the Madras Act XIX of 1951 and hence section 93 of the Act cannot be invoked to bar the suit.

The rules governing the *Podu Deekshidars* of the temple have no statutory force. Hence the fact that the remedies provided thereunder had not been exhausted cannot preclude an aggrieved party from approaching the civil Court for relief.

* S.A. No. 1887 of 1962. 29th March, 1967.

The suit as prayed for must therefore be decreed.

However, it was held that the plaintiff is not entitled to his costs.

Appeal against the Decree of the Court of the Subordinate Judge of Cuddalore in Appeal Suit No. 216 of 1961, preferred against the decree of the Court of the District Munsif of Chidambaram in Original Suit No. 112 of 1959.

A. Sundaram Iyer and *N. Vanchinathan*, for Appellant.

R. Ramamurthi Aiyer and *V. Ratnam*, for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff who has failed in both the Courts below is the appellant in this Second Appeal and the only question that falls for determination is whether the civil Court has jurisdiction to entertain the suit in question. The short facts are: The plaintiff is one of the Podu Deekshidars of Sri Sabanayakar Temple, Chidambaram, and the suit is for a declaration that he is entitled to all the duties of his office in the above temple and to receive the emoluments therefor and for a permanent injunction restraining the defendant and the Podu Deekshidars from interfering with his performance of the duties of his office. The defendant has been impleaded as the Secretary of the Podu Deekshidars of the temple and as representing the temple and its Podu Deekshidars. The cause of action for the suit arose when on the failure of the plaintiff to keep a newly introduced " Kaval Morai " (temple watch turn); he was fined and on failure to pay the fine amount the next day his rights in the temple as Podu Deekshidars for the vattam were auctioned away and sold to one Chandrasekhara Deekshidar, another Podu Deekshidar. The temple at Chidambaram and the wordship therein and the status of the Podu Deekshidars have been the subject of discussion and consideration in *Natesa* v. *Ganapathi*[1], and in *Marimuthu Dikshidar* v. *State of Madras*[2], decided along with *Sri Shirur Mutt* v. *Commissioner, H. R. E. Board*[3]. As will be seen from these decisions, the management of the temple is vested in the body ofDikshidars. The Dikshidars combine in themselves the functions of trustees as well as Archakas. They have no inams and they have to devote their time exclusively to look after the affairs of the temple and carry on the worship in it by an internal arrangement entered into between themselves over a century ago, as evidenced by the rules framed by them. These Dikshidars are prohibited from taking up any other avocation and of necessity they have to depend upon for their livelihood on what they receive at the temple either as Dakkshina or other offerings made to the deity. As pointed out by this Court in *Sri Shirur Mutt* v. *Commissioner, H. R. E. Board*[3], they are bound up with the temple and service to God is the only source of their livelihood. The rules framed by these Dikshidars who are Dharmakarthas and Archakas provide for custody of the properties, turns of worship, etc. The rules governing them are exhibited in the present case as Exhibits A-2 and B-4. The rules also cover the administration of the temple by the Podu Dikshitars. There is also a scheme framed under Madras Act II of 1927 for the better administration of the temple. The Dishidars are generally on duty in the temple 20 at a time, each batch of 20 staying on duty for 20 days. There are six turns of service provided for Puja Morai, Padukkai Morai, Asthandra Morai, Maniyam Morai, Committee Morai and Vahana Mandapa Morai. Morai lists are prepared and put up by reference to which the Dishidars take up their Morais and attend to the duties. At the beginning of each period of 20 days called Vattam, the lists containing the various turns of the turn holders are published on the notice board of the temple. The Padukkai Morai consists of five persons for five days. Their duties are to keep watch and ward in the principal shrine of Sri Nataraja during nights and in the day time to perform Archanas for such pilgrims as may come. In addition to this, the watch and ward

1. (1891) I.L.R. 14 Mad. 103.
2. W.P. Nos. 379 and 380 of 1951.
3. (1952) 1 M.L.J. 557 at 599.

duty has to be performed by the Poojai Moraikars, 20 in number, for 4 days in each of the Sannidhanams. Thus there would be generally 25 turn holders safeguarding the temple. In addition, two Dikshidars have to see to the safety of the Vahanams and the temple vessels. They are called Vahanamandapa Moraikars. This system of safeguarding the shrine and its properties has been in vogue for several decades. The rules of the temple are contained in rule books and resolutions of the general body made from time to time. While as Podu Dikshidars they constitute a body of trustees of the temple, when they act as Archakas they will be servants of the trustees, that is, then they carry out their obligations to the temple, and are subject to the disciplinary jurisdiction of the body of trustees.

It so happened that in Arpasi, 1958, there was theft of gold plates in three stoopies of the Kanakasabai adjacent to Sanctum Sanctorum. Thereupon a general body meeting of the Podu Dikshidars was convened on 26th October, 1958, and a resolution was passed at the meeting that another set of 21 Dikshidars must guard the temple and prevent thefts. The resolution was later amended on 10th November, 1958, at another general body and in accordance with this resolution it was resolved that 8 Dikshidars should do " Kaval Morai " by turn from 12 noon to 5 P.M. and from 10-30 P.M. to 6 A.M. from the topmost terrace of the temple to prevent thefts. There can be no two views that the introduction of the Kaval Morai was in the best interests of the temple and *bona fide* made by the Dikshidars who attended the general body meeting. Nor is it questioned that the general body of the Dikshidars has power to make new rules. The plaintiff herein was given intimation of his turn in the Kaval Morai which fell on 3rd December, 1958 and 4th December, 1958 according to usage. While other persons received notice of their turns, the plaintiff refused to receive the notice and he was fined Rs. 10. The fine was not paid immediately in terms of the rules and there was a default fine of Rs. 23-8-0 payable on or before 5th December, 1958. The plaintiff paid these fine amounts under protest and it is stated that he went up in appeal to the Deputy Commissioner, Hindn Religious and Charitable Endowments. The plaintiff's next turn came on 20th January, 1959 and 21st January, 1959. He failed to discharge his duties on these two days and he was again fined Rs. 10 per each day. The fine amounts were not paid and so they were enhanced by 25 per cent. The plaintiff still did not pay the fine amounts. Thereafter in accordance with the usage on 22nd January, 1959, the plaintiff's rights as Dikshidar were put up in auction among the Dikshidars, as already stated. It is thereupon the plaintiff came up with the suit challenging the validity of the new Kaval Morai and the consequential absence of jurisdiction to fine him and put up his rights as a Dikshidar in auction for realisation of the fine amount.

Both the Courts below have upheld the plaintiff's contention that the resolution introducing the new Kaval Morai has not been validly passed by the general body and would not therefore be binding on the plaintiff. They would further hold that on the basis of the invalid resolution the plaintiff cannot be punished for not discharging the duties of Kaval Morai, and that his suspension from service is unjust and illegal. But in the view that the civil Court's jurisdiction is taken away by virtue of the provisions of the Madras Hindu Religious and Charitable Endowments Act, 1951, the suit has been dismissed.

The basis for the finding of invalidity of the resolution is found in the rules themselves. The quorum for a general body meeting of the Podu Dikshitars is fixed under rule 41 of the rules as 44 members. The general body is also given powers to make new rules and enforce the same. But for this purpose also the quorum is fixed at 44 members. It appears that the Podu Dikshidars had passed a resolution fixing the quorum of a general body meeting at 21. But in this general body of the Podu Dikshitars where the quorum was reduced from 44 to 21 only 19 Dikshidars were present. When the resolution fixing the Kaval Morai was passed,

no doubt 29 Dikshidars were present. But the resolution fixing the quorum at 21 can have no validity, as it was passed by a general body of only 19 members. If at that meeting 44 members had been present, they could have validly reduced the quorum of a general body from 44 to 21. The anomaly and the extreme irregularity of the proceeding under which the quorum was reduced to 21 are too apparent. It is in these circumstances that the Courts below have held that the resolution providing for Kaval Morai was invalid and not binding on the plaintiff. The plaintiff has not accepted the Kaval Morai and when he once paid the fine amounts, he paid them under protest without prejudice to his rights to challenge the same. For the defendant it is contended that in accordance with the rules and usage for realisation of the fine amounts his rights in the temple have been sold and therefore he was lawfully prevented from doing the duties of his office as Archaka and trustee. This plea in defence has not been accepted by the Courts below and quite properly. The plaintiff is bound to obey and carry out the directions of the general body of the trustees duly published and communicated. He will be guilty of indiscipline and disobedience on failure to obey all the lawful directions of the general body. But here the Kaval Morai system is not a duty lawfully imposed on him. It cannot be said that the Kaval Morai system introduced by a resolution passed at a general body meeting where there were less members than the quorum prescribed is valid. Consequently the Kaval Morai system should be considered to be null and void and not an obligation or duty imposed either by custom or usage or rules governing the Podu Dikshidars.

The question now is whether the plaintiff is prevented by any provision of law or by the rules of the temple from challenging the validity of the 'Kaval' rules and getting a declaration in the Court of their nullity and thus have established his rights and duties as a Podu Dikshidar in the temple.

First, the objection to the maintainability of the suit based on certain provisions in the rules governing the Podu Dikshidar may be disposed of without much difficulty. The Courts below have not accepted the objection. A plea was put forward on behalf of the defendant that under the rules appeals are provided to special bodies the Maha Sabha and Sidhantha Sabha from the decisions of any general body, and that without exhausting this remedy, a suit is not cognizable by a civil Court. These rules have no statutory force. They are framed by a domestic forum and cannot preclude a party aggrieved from approaching the civil Court for relief. In *Satyanarayana Murthi* v. *Narayana Murthi*[1], a question arose whether the right of suit was taken away by a rule made under the power conferred by a scheme framed for the administration of school. The head clerk questioned his dismissal by the Executive Committee of the School. Under the rules governing the management of the institution an appeal was provided from a decision or order of the Executive Committee to the General Committee and finality was given to the decision of the General Committee. Overruling the contention that the rule barred a remedy of approaching the civil Court, the learned Judge Satyanarayana Rao, J., said :

> "The present is not a case of a right for the first time created by a statute along with a remedy to enforce that right and therefore the person claiming that right or deprived of that right should pursue the remedy provided by the statute, be that is his only exclusive remedy. The right of suit under section 9 cannot be taken away by a rule made under the power conferred by the scheme framed for the administration of the school. It has no statutory force and cannot affect the provisions of the Civil Procedure Code. My attention has not been drawn to any authority which holds that in such circumstances by the existence of a rule which provides an optional remedy by way of appeal to the General Committee the aggrieved party has no right to go to a civil Court to have an adjudication on the right which he claims in the suit."

1. (1951) 2 M.L.J. 333: I.L.R. (1952) Mad. 535: A.I.R. 1952 Mad. 106 at 107.

The more formidable bar is in the provisions of the Madras Hindu Religious and Charitable Endowments Act(XIX of 1951) now repealed by Madras Act (XXII of 1959). There is little difference between the two Acts in regard to the concerned provisions. Section 49 of Madras Act (XIX of 1951) runs as follows :—

> " (1) All office-holders and servants attached to a religious institution or in receipt of any emolument or perquisite therefrom shall, whether the office or service is hereditary or not, be controlled by the trustee; and the trustee may, after following the prescribed procedure, if any, fine, suspend, remove or dismiss any of them for breach of trust, incapacity, disobedience of orders, neglect of duty, misconduct or other sufficient cause.
>
> (2) Any office-holder or servant punished by a trustee under sub-section (1) may, within one month from the date of the receipt of the order by him, appeal against the order to the Deputy Commissioner.
>
> (3) A hereditary office-holder or servant may, within one month from the date of the receipt by him of the order of the Deputy Commissioner under sub-section (2), prefer an appeal to the Commissioner against such order."

The argument for the defendant based on this provision is that in view of the provisions for appeal to the Deputy Commissioner and further appeal to the Commissioner, the right of the plaintiff to sue is barred. Section 49 by itself does not contain any express prohibition against an aggrieved party going to a civil Court. Nor does it give any finality to the order of the Commissioner. Only a provision for departmental appeal has been provided for. But there is section 93 which runs thus :

> " No suit or other legal proceeding in respect of the administration or management of a religious institution or any other matter or dispute for determining or deciding which provision is made in this Act shall be instituted in any Court of law, except under, and in conformity with, the provisions of this Act."

Learned Counsel for the defendant argues that whether the suit in the form presented may be considered to be one relating to the administration or management of the religious institution, it is certainly a matter or dispute for determining or deciding which provision has been made in the Act. It is therefore contended that no suit should be instituted in a civil Court except when provided under the Act. In other words, the contention is that there is an absolute bar to the institution of any suit in a civil Court in respect of such matters, unless it is permitted by the Act. That is, the clause " except under, and in conformity with the provisions of this Act " does not relate merely to procedural aspect of the suit permitted under the Act but is also a prohibition against the institution of any suit, unless it is provided specifically under the Act. Reading sections 49 and 93 together, *ex facie* it appears that all suits in relation to the matters referred to in section 93, unless a provision for it is made under the Act, are barred.

In *State of Madras* v. *K. Melamatam*[1], the Supreme Court observed :

> " Now, one of the disputes in this suit is whether the institution is a religious institution within the meaning of Act XIX of 1951. Specific provision is made in sections 57,61 and 62 of the Act for determination of that dispute by the Deputy Commissioner, the Commissioner and eventually by a suit instituted in a Court under section 62. The present suit is not brought under or in conformity with section 62 and consequently in so far as the suit claims the relief of injunction restraining the levy of contribution and audit fees under Act XIX of 1951, it is barred by section 83 of the Act."

In the present case, as pointed out above, there is no provision for any suit challenging the ultimate order the Commissioner may make in the matter. Here what has

1. (1966) 2 S.C.J. 175: (1966) 2 M.L.J. (S.C.) 13: (1966) 2 An.W.R. (S.C.) 13: A.I.R. 1965 S.C. 1570 at 1573.

happened is that pursuant to the order under section 49 the management has purported to put up in auction the plaintiff's right as Dikshidar and had sold it away. No question was raised before me as to the validity of such mode of realisation of fine by a private body. It is stated to be based on usage and custom and in the absence of any argument directed on that matter, I shall not examine the validity of the same. The relief claimed in substance relates to the personal rights of the plaintiff as a trustee or Dikshidar which he lost by auction and sale of the same pursuant to a fine invalidly levied. In *Sri Shirur Mutt* v. *Commissioner, H. R. E., Madras*[1], referring to the suit temple it is pointed out that the position of the Dikshidars of Chidambaram labelled trustees of the temple is virtually analogous to that of a Matathipathi of a Mutt except that the Pothu Dikshidars of the temple functioning as trustees will not have the same dominion over the income of the properties of the temple which the Matathipathi enjoys in relation to that income from the Mutt and its properties. In essence here the plaintiff is asserting his personal rights which have been forfeited.

When a plea is put forward that in any matter the jurisdiction of a civil Court to entertain a suit is barred, the question has to be examined bearing in mind the general presumption in favour of the jurisdiction of the civil Court. It has been repeatedly pointed out that the proper tribunals for determination of disputes as to rights and properties are Courts and a person's right to resort to a civil Court should not be whittled down unless it is expressly or by necessary implication barred by a statute. As observed by Gajendragadkar, J. (as he then was) in *Firm I. S. Chetty & Sons* v. *State of Andhra Pradesh*.[2]

> " The exclusion of the jurisdiction of civil Courts to entertain civil causes will not be assumed unless the relevant statute contains an express provision to that effect, or leads to a necessary and inevitable implication of that nature. The mere fact that a special statute provides for certain remedies may not by itself necessarily exclude the jurisdiction of the civil Courts to deal with a case brought before it in respect of some of the matters covered by the said statute."

It that case the Supreme Court had to consider the scope of section 18-A of the Madras General Sales Tax Act, 1939 which barred suits or other proceedings except as expressly provided for in the Act to set aside or modify any assessment made under the Act. The bar under section 18-A was held to cover and as excluding the jurisdiction of civil Courts in respect of the suits covered by the provision and the prohibition was treated as express. While holding that there can be no doubt that where an order of assessment has been made by an appropriate authority under the provisions of the Act any challenge to its correctness and any attempt either to have it set aside or modified must be made before the appellate or the revisional forum prescribed by the relevant provisions of the Act and a suit instituted for the purpose would be barred under section 18-A, it was emphasised that while providing for a bar to suits in ordinary civil Courts in respect of matters covered by section 18-A the Legislature has taken the precaution of safeguarding the citizen's right by providing for adequate alternative remedies. After referring to the provision in the Act which enables the matter to be heard by a Bench of not less than two Judges in the High Court, it is stated that in the light of the elaborate alternative remedies provided in the Act the scope and effect of section 18-A must be judged. Adverting to the oft-quoted observations of Lord Thankerton in *Secretary of State* v. *Mask & Co.*[3] it is stated:

> " Non-compliance with the provisions of the statute to which reference is made by the Privy Council must, we think, be non-compliance with such fundamental

1. (1952) 1 M.L.J. 557.
2. (1963) 2 S.C.J. 725:(1964) 1 M.L.J.(S.C.) 5: (1964) 1 An.W.R. (S.C.) 5: (1964) 1 S.C.R. 752: A.I.R. 1964 S.C. 322 at 324.
3. L.R. 67 I.A. 222 : (1939-40) F.C.J. (P.C.) 15: I.L.R. (1940) Mad. 599 : (1940) 2 M.L.J. 140: A.I.R. 1940 P.C. 105 at 110.

provisions of the statute as would make the entire proceedings before the appropriate authority illegal and without jurisdiction. Similarly if an appropriate authority has acted in violation of the fundamental principles or judicial procedure that may also tend to make the proceedings illegal and void and this infirmity may affect the validity of the order passed by the authority in question. It is cases of this character where the defect or the infirmity in the order goes to the root of the order and makes it in law invalid and void that these observations may perhaps be invoked in support of the plea that the civil Court can exercise its jurisdiction notwithstanding a provision to the contrary contained in the relevant statute".

In *Kamala Mills* v. *Bombay State*[1], section 20 of the Bombay Sales Tax Act corresponding to section 18-A of the Madras Sales Tax Act was under consideration. The argument in that case for the State was that the bar under section 20 can have no application when the order of assessment which the citizen sought to challenge was one without jurisdiction, that is, it is a nullity. Gajendragadkar, C.J., in proceeding to consider the validity of the contention started the discussion observing:

" In deciding the validity of this contention, it is necessary to examine the scope of the jurisdiction conferred on the appropriate authorities by the relevant provisions of the Act. In other words, is the decision about the character of the transaction the decision of a collateral fact, the finding on which alone confers jurisdiction on the Tribunal to levy the tax or is it the decision on a question of fact which is left to be determined by the appropriate authority itself? If the jurisdiction conferred on the appropriate authority falls under the first category, then its finding that a particular transaction is taxable under the relevant provisions of the Act, would be a finding on a collateral question of fact, and it may be permissible to a party aggrieved by the said finding to contend that the tax levied on the basis of an erroneous decision about the nature of the transaction is without jurisdiction. If, however, the appropriate authority has been given jurisdiction to determine the nature of the transaction and proceed to levy a tax in accordance with its decision on the first issue, then the decision on the first issue cannot be said to be a decision on a collateral issue, and even if the said issue is erroneously determined by the appropriate authority, the tax levied by it in accordance with its decision cannot be said to be without jurisdiction."

Proceeding the learned Chief Justice observed :

" In every case, the question about the exclusion of jurisdiction of civil Courts either expressly or by necessary implication must be considered in the light of the words used in the statutory provision on which the plea is rested, the scheme of the relevant provisions, their object and their purpose..................... If it appears that a statute creates a special right or a liability and provides for the determination of the right and liability to be dealt with by tribunals specially constituted in that behalf, and it further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, it becomes pertinent to enquire whether remedies normally associated with action in civil Courts are prescribed by the said statute or not...................If we are satisfied that the Act provides for no remedy to make a claim for the recovery of illegally collected tax and yet section 20 prohibits such a claim being made before an ordinary civil Court the Court may hesitate to construe section 20 as creating an absolute bar, or if such a construction is not reasonably possible, the Court may seriously examine the question about the constitutionality of such express exclusion of the civil Court's jurisdiction having regard to the provisions of Articles 19 and 31 of the Constitution. It is with this two-fold object that this aspect of the matter must now be examined."

1. (1966) 2 S.C.J. 591 : (1963) 1 S.C.R. 64: A.I.R. 1965 S.C. 1942 at 1947, 1951 and 1952.

The above reference shows that even where the jurisdiction of a civil Court is excluded in so many words, the civil Court will have jurisdiction to examine whether the provisions of the Act have been complied with, whether the action is under the Act in question and whether the Tribunal has acted in conformity with the fundamental provisions of the statute. In the present case the contention of the plaintiff is that his proprietary right as a Dikshidar has been put up in public auction by a domestic body pursuant to a rule which is wholly void and illegal. Section 49 of the Act which provides for disciplinary jurisdiction of a trustee enables him to fine, suspend, remove or dismiss any of the office holders or servants of a religious institution for breach of trust, incapacity, disobedience of orders, neglect of duty misconduct or other sufficient cause. The ground relied upon in the present case for imposing fine on the plaintiff is his disobedience of the order and neglect of duties. There is no duty here enjoined by relevant rules. Nor can it be said that there is any disobedience of the order. The rule in question which is stated to have been disobeyed has not been framed by a body of the trustees competent to frame any rule. It is as if a total stranger having no connection with this institution makes an order for infringement of which the punishment is imposed. In such circumstancs it cannot be said that the trustee has exercised a disciplinary jurisdiction which he has in the matter. The act in question which is impugned is not an act which falls under section 49 of the Act. There can be no recognition of an act as one under the Act which is passed without jurisdiction. One can speak of disobedience of an order or neglect of duty in relation to orders which could be recognised in law or a duty which can be enforced. In the present case the plaintiff is not challenging an error, if any, of the trustee in the exercise of his jurisdiction. An erroneous order may be within the jurisdiction. Excessive punishment may also within the jurisdiction of the trustee and under the Act. But the impugned Act is not one under the Act or under the rules governing the institution. It cannot even govern the domestic forum. In such circumstances when it cannot be considered to be an order under section 49, section 93 cannot be invoked. Moreover section 49 speakes only of fining, suspending, removing or dismissing. What has happened in the present case is that the right of the plaintiff as a Dikshidar was put up for sale in realisation of the fine. It certainly does not fall under section 49 and no provision of the Act has been brought to my notice under which the fine could be realised in that manner under the Act. It follows that this is not a matter where it could be said that provision has been made under the Act for determining or deciding the matter in dispute. Nor is the relief claimed in the suit in substance one in respect of the administration or management of a religious institution as the phrase has been interpreted—See *Kallalagar Devasthanam* v. *Thirumalai Nambigal*[1]. In *Kallalagar Devasthanam* v. *Thirumalai Nambigal*[1], where a hereditary archaka and Miras service-holder was dismissed and the order was confirmed on appeal by the H. R. E. Board under Act II of 1927, the aggrieved archaka filed a suit. When objection was taken in that case to the maintainability of the suit, this Court held that a civil Court has power to go into the question and ascertain whether any of the reasons did in fact exist which would confer jurisdiction on the trustee to act under section 43 and if it found that they did not exist, the trustee should be held to have exceeded the powers conferred by section 43 of the Act, and that therefore the decision of the Board could not be regarded as final. Section 43 there corresponded to section 49 now under consideration. The learned Judges observed :

> "We must, however, make it clear that it is only in cases where the trustee has actually acted for the reasons given in sub-clause (1) of section 43 and enumerated in the last paragraph that the provisions of sub-clauses (2) and (3) can be attracted. If a trustee is, on the other hand, found to have fined, suspended, removed or dismissed as office holder or a servant attached to a temple either for reasons other than those mentioned in sub-clause (1) or although he purported to act for one of the reasons mentioned in that sub-clause, those reasons were not in fact found by him to have existed, the order of the trustee would not fall within the purview

1. (1943) 1 M.L.J. 496 at 501, 502.

of sub-clause (1) of that section and the orders of the Committee or of the Board could not be consequently held to be final under the latter sub-clauses."

The decision of this Court in *Ramanatha Gurukkal* v. *Arunachalam Chettiar*[1], was distinguished as not having decided the question whether the trustee had not acted for any other reasons stated in sub-clause (1) of section 43. The learned Judges observed :

"It is true that a civil Court is not a Court of Appeal ; but it is open to a civil Court to examine the grounds on which the trustee has acted and to ascertain whether they could or could not be brought under the section................ We would therefore hold that the civil Courts have the power to go into the question and to ascertain whether any of the reasons did in fact exist which would confer jurisdiction on the trustee to act under section 43 and if it be found that they did not exist (as we had already found in this case) he must be held to have exceeded the powers conferred on him by section 43 of the Hindu Religious Endowments Act and the decision of the Board could not, therefore, be regarded as final. And in the absence of the finality of that decision, the jurisdiction of the civil Courts could not be found to have been ousted."

I may here remark that section 93 as it now stands is wider in its scope than the corresponding section 43 which was considered in the case cited above. We have in the present Act the words " No suit or other legal proceeding in respect of the administration or management of a religious institution or any other matter or dispute for determining or deciding which provision is made in this Act." The bar is not confined to matters relating to administration or management of a religious institution. But on a consideration of all the aspects of the matter—the provisions of the Act, the nature of the order in question, the nature of the challenge and the reliefs claimed in the suit I have to hold that it is not a matter for the determination or decision of which there is a provision in the Act. The disciplinary jurisdiction here exercised is not with reference to disobedience of any legal or valid order ; nor is there any neglect of any duty which the archaka owed to the institution. It is something wholly outside the Act and the body which punished the plaintiff had no competence in the circumstances to impose any penalty whatsoever. The follow up by the sale of his rights as Dikshidar which in fact is what hurts the plaintiff is a void act and a nullity. Usage may justify such mode of recovery only for fines validly levied. The Courts below, as already stated, have concurred in finding that the resolution was an invalid one. But in their view a civil Court has no jurisdiction in the matter. As I view it in the particular circumstances of the case, the Civil Court has jurisdiction to entertain the suit in question for the reliefs prayed for. The plaintiff here is asserting his personal rights which have been deprived of in an illegal manner and without jurisdiction. It follows that the plaintiff will be entitled to a decree as prayed for. The second appeal is allowed and the suit is decreed in favour of the plaintiff.

Coming to the question of costs, I do not think that this is a fit case where the plaintiff is entitled to costs. May be that the rules in question have not been validly framed. But he himself is a trustee and as a person interested in the safety of the temple and its properties, it is his moral duty to have taken up the turn and then protested. He is not just like a servant of the temple. He combines in himself also all the powers and responsibilities of a trustee. The general body which purported to frame the rules, framed them *bona fide* to protect the temple and its properties against wanton acts of theft and sacrilege. It is a temple in which the public are interested and the Podu Dikshidars are trustees in charge of the temple. It may be a denominational temple ; still it is a public institution which has millions of devotees. In such circumstances leaving out strict legal aspects it does not behave any Podu Dikshidar to refuse to take up his turn of watch in the interests of the institution on the only ground that it was invalid. In institutions of this kind when the

1. (1939) 2 M.L.J. 516: I.L.R. (1939) Mad. 81.

rule or order cannot otherwise be assailed, one would expect first compliance under protest, if need be and then steps consistent with the status of the Dikshidars to bring home the invalidity of the order. If a Dikshidar is meticulous about the legality of the proceedings, he may have it invalidated by the appropriate body or get it invalidated. It is no doubt necessary to avoid charges of authoritarianism and arbitrariness, that there must be regularity in proceedings and rules are meticulously observed when making fresh rules or passing orders ; irregularity in these matters if not rectified, may become undesirable precedents. But it is quite different from saying that as a responsible person interested he should co-operate with the general body while insisting on repealing the irregular proceedings. The Podu Dikshidars have in their domestic forum a fine and complete set of rules which has stood the test of time ; it is over a century old. It does not redound to the credit of this ancient institution that there should be civil litigation in respect of disciplinary matters—such litigation is not conducive to comity among Dikshidars. In these circumstances the parties will bear their respective costs throughout. No leave.

V.K. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

The Trustees of the Port of Madras .. *Petitioners**

v.

Mettur Chemical and Industries Limited, Salem .. *Respondent.*

Madras Port Trust Act (II of 1905), *section* 110 *and the Indian Limitation Act (IX of* 1908), *sections* 29 (2) *and* 15 (2)—*Suit for damages against Port trust—Limitation—Exclusion of the period of notice—Whether plaintiff entitled to benefits of section* 15 (2) *of the Limitation Act.*

The party's right of suit in this case is under the general law, outside the Act and by section 110, only a limitation is placed on the period within which the suit should be filed. It is not the Act that confers the right of suit. But for the specific provision, the plaintiffs would be governed by the provisions of the Indian Limitation Act. The plaintiffs would be entitled to rely on section 29 (2) of the Act. Section 110 does not provide a complete code itself both in respect of the substantive law as well as the procedural law. It even does not purport to be one.

A particular section can be considered to be expressly excluded only if there are specific words to the effect excluding the applicability of the section. The language and the meaning of the words expressly excluded in section 15 (2) cannot be whittled down. However imperative the time-limit may be under section 110, it is still only inferentially or by implication, it may be necessary implication, that section 15 (2) of the Limitation Act is excluded and an outer limit fixed.

Section 110 only provides for a period of limitation different from that indicated under the Indian Limitation Act and it will be open to the plaintiffs in the absence of express exclusion of the applicability of section 15 (2) of the Limitation Act to rely upon the provisions of section 15 (2) of the Indian Limitation Act in computing the period.

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Full Bench of the Court of Small Causes at Madras, dated 10th August, 1962, and made in New Trial Application No. 472 of 1960 (Suit No. 607 of 1959 on the file of the Chief Judge, Court of Small Causes at Madras).

V. V. Raghavan and *J. Nagarajan*, for Petitioners.

N. Krishnamachari, for Respondent.

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* C.R.P. No. 104 of 1963. 21st January, 1966.

The Court delivered the following

JUDGMENT.—This revision has been preferred by the Trustees of the Port of Madras, defendants in a suit for the recovery of damages for short delivery of goods. It is a finding of the Court of Small Causes, Madras, not open to challenge in revision, that the goods had been landed and the defendants are liable in damages for the sum of Rs. 940 claimed.

The learned Counsel Mr. V. V. Raghavan appearing for the petitioners contends that the suit should not have been entertained at all by the Court below as it was barred under section 110 of the Madras Port Trust Act (II of 1905). The plaintiffs had been given the *C* certificate on 2nd July, 1958, and on that date, the cause of action for the suit arose. The suit has been actually filed on 22nd January, 1959. Section 110 of the Madras Port Trust Act provides :

"No suit or other proceeding shall be commenced against any person for anything done, or purporting to have been done, in pursuance of this Act without giving to such person one month's previous notice in writing of the intended suit or other proceeding, and of the cause thereof, nor after six months from the accrual of the cause of such suit or other proceeding."

Admittedly, the notice required under the first part of section 110 has been given in this case. But what the learned Counsel for the defendants contends is that the suit must be filed within six months of the accrual of the cause of action and the language of section 110 is emphatic that no suit shall be filed afterwards.

The plaintiffs seek to get over this bar pleaded by relying on section 15 (2) of the Indian Limitation Act, 1908, which enables plaintiffs to exclude the period of any notice which has to be given in accordance with the requirements of any enactment while computing the period of limitation prescribed for any suit. There can be no question that if the plaintiffs can exclude this period, the suit will be within time. For taking the benefit of section 15 (2), the learned Counsel for the plaintiffs relies on section 29 (2) of the Indian Limitation Act. Section 29 (2) provides that :

"Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the first schedule, the provisions of section 3 shall apply as if such period were prescribed therefor in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law—

(*a*) the provisions contained in section 4, sections 9 to 18, and section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law ; and

(*b*) the remaining provisions of this Act shall not apply ...."

The first contention of the learned Counsel for the petitioners is that section 110 of the Port Trust Act by itself provides a complete code and it is not open to the plaintiffs to rely on section 29 of the Limitation Act to seek the benefit of section 15 of the Act to exclude the one month period of notice. The learned Counsel lays considerable emphasis on the language of section 110 that the suit shall not be filed *after six months from the accrual of the cause of action.* In fact, the contention is that the right of suit is given under certain conditions and this period of six months must be taken as a condition for such a suit. This contention to begin with I am unable to agree. The party's right of suit in this case is under the general law, outside the Act and by section 110, only a limitation is placed on the period within which the suit should be filed. It is not the Act that confers the rights of suit. But for the specific provision, the plaintiffs would be governed by the provisions of the Indian Limitation Act. In my view, the plaintiffs would be entitled to rely on section 29 (2) of the Act and I am unable to agree with the contention of the learned Counsel that section 110 provides a complete code itself both in respect of the substantive law as well as the procedural law. It even does not purport to be one.

Learned Counsel next contends that it must be considered on the language of section 110 that the applicability of section 15 of the Indian Limitation Act is expressly excluded. Learned Counsel submits that on the emphatic language (nor after six months) it is a compelling inference that the suit must be filed within six months and that there can be no extension of the period. It is pointed out that section 110 does not say that the suit must be filed within six months. It goes further and says that it shall not be filed after six months. But the question for consideration is whether in the circumstances, it can be said that the applicability of section 15 (2) is *expressly excluded* in the language of the section. In my view, a particular section can be considered to be expressly excluded only if there are specific words to the effect excluding the applicability of the section. The language and the meaning of the words *expressly excluded* in section 15 (2) cannot be whittled down. However imperative the time-limit may be under section 110, it is still only inferentially or by implication, it may be necessary implication, one has to say that section 15 (2) of the Limitation Act is excluded, and an outer limit fixed.

In *Sati Prasad Garga* v. *Gobinda Chandra Shee*[1], Cuming, J., observes at page 810 :

> " By the expression ' expressly ', I think, it is meant that express reference is made to the specific section in the Act ; and that, unless such reference is made to the sections and by that reference they are expressly excluded, then they would apply."

Language similar to, if not more emphatic than the language employed in section 110 has been the subject of consideration in several cases. In *Chhaganlal* v. *Thana Municipality*[2], section 167 of the Bombay District Municipal Act came up for consideration. There also, there was a provision for one month's previous notice and the section provided that the suit shall not be commenced after six months from the date of the act complained of. The learned Judges held that if this language excludes the provisions of the Limitation Act, it excluded them by implication only and not expressly. They followed the decision of the High Court in *Rewachand* v. *Karachi Municipality*[3], on the identical question.

Mr. V.V. Raghavan, learned Counsel for the respondents, placed before me the decision of the Sind High Court reported in *Rewachand* v. *Karachi Municipality*[4], where the single Judge held with reference to section 167 itself that the section in plain and unambiguous terms prevented the claimant from commencing his suit after six months from the date of act complained of, and thereby expressly excluded the time being extended, under section 15, clause 2 of the Limitation Act. But this case was reversed on appeal by the decision in *Rewachand* v. *Karachi Municipality*[3], earlier cited followed by the Bombay High Court in *Chhaganlal* v. *Thana Municipality*[2].

The Calcutta High Court also taken a similar view in *Patna Municipality* v. *Nirodo Sundari*[5]. The language to be construed there was *within six months next after the accrual of the cause of action and not afterwards* in the Bengal Municipal Act, certainly more emphatic than the language in section 110 of the Port Trust Act. There also, there was a period of one month's notice provided and the plaintiff sought to deduct the period of notice. The contention was strongly urged there, that no effect could be given to the words *and not afterwards* if exclusion was granted of the notice period. After observing that there was a good deal of force in the contention, Biswas, J., observed :

> "It may well be that the Legislature by adding other words ' and not afterwards' did intend to exclude the applicability of those provisions of the Limitation Act which would operate to extend time in various contingencies. Unfortunately, however, if that was the intention of the Legislature, they failed to carry it out by using appropriate language for that purpose. The language they used ' and not afterwards ', might possibly operate in the way intended, but by reason of

1. (1928) I.L.R. 56 Cal. 805.
2. A.I.R. 1932 Bom. 259.
3. A.I.R. 1930 Sind. 93.
4. A.I.R. 1925 Sind. 322.
5. A.I.R. 1942 Cal. 544, 545.

the terms used in section 29 (2) (*a*), Limitation Act, I think it fell short of what was thereby required. The words 'expressly excluded' mean what they may. In order that the exclusion may be express, I think that the particular sections of the Limitation Act which are intended to be excluded must be specifically indicated by the special or local law in question. So far as the words, 'and not afterwards' are concerned, the utmost that can be said is that the exclusion of these sections of the Limitation Act may be easily spelt out therefrom, but, in my opinion they will not amount to an express exclusion."

Reference in this connection may also be made to a decision of the Supreme Court in *Vidyacharan* v. *Khubchand*[1], as to the scope of section 29 (2) of the Limitation Act in reference to section 116-A of the Representation of the People Act. The learned Judge Subba Rao, J., observes at page 1112:

"The contention is that sub-section (3) of section 116-A of the Act not only provides a period of limitation for such an appeal, but also the circumstances under which the delay can be excused, indicating thereby that the general provisions of the Limitation Act are excluded. There are two answers to this argument. Firstly, section 29 (2) (*a*) of the Limitation Act speaks of express exclusion but there is no express exclusion in sub-section (3) of section 116-A of the Act...."

In my view, section 110 only provides a period of limitation different from that indicated under the Indian Limitation Act and it will be open to the plaintiffs in the absence of express exclusion of the applicability of section 15 (2) of the Limitation Act to rely upon the provisions of section 15 (2) of the Indian Limitation Act in computing the period. Thus viewed, the suit is within time.

In the result the revision fails and is dismissed with costs.

S.V.J. *Revision dismissed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Chief Justise*, MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE M. NATESAN.

The Chief Controlling Revenue Authority .. *Referring Officer**

v.

Rustom Nusserwanji Patel .. *Respondent.*

Stamp Act (*II of* 1899), *Schedule I, Article* 23 *and Article* 55—*Conveyance and release—Distinction.*

A release can be usefully employed as a form of conveyance by a person having some right or interest to another having a limited estate and the release then operates as an enlargement of the limited right. A release can only feed title and cannot transfer title and as such, a release should necessarily be in favour of some one who had already some title to the estate and the effect of the release is only to enlarge that right.

In case of co-owners each co-owner is in theory entitled to enjoy the entire property in part and in whole. It is not therefore necessary for one of the co-owners to convey his interest to the other co-owner. It is sufficient if he released his interest. The result of such a release would be the enlargement of the share of the other co-owner. There can be no release by one person in favour of another who is not already entitled to the property as co-owner.

Board of Revenue v. *Murugesa Mudaliar*, (1955) 2 M.L.J. 166 : I.L.R. (1955) Mad. 1133 (F.B.); *Kuppuswami Chettiar* v. *Arumugham Chettiar*, Since reported in (1967) 2 S.C.J. 5: (1967) 2 M.L.J. (S.C.) 29, followed.

Where two persons have title to a property and their respective title cannot be demarcated or fixed with reference to any particular part of the property *i.e.*,

1. (1964) 6 S.C.R. 129 : A.I.R. 1964 S.C. 1099.

* Case referred No. 3 of 1962. 28th February, 1967.

where there is a common title and joint possession that can only be severed by partition, one the persons can enlarge the right of the other to the entire property by releasing his interest in the same. The mere fact that the co-owners may in a sense be also described as tenants-in-common would not convert a document of release into a conveyance.

Where a property stands in the name of the father and his first son and the second son releases his interest in the same, although for a stated consideration, in favour of the first son, the transaction is only a release and not a conveyance and the fact that the releasor, second son, derived his title from the father, would make no difference.

Case referred to the High Court by the Chief Controlling Revenue Authority under section 57 (1) of the Indian Stamp Act, 1899. The decision of the following question, namely whether the document dated 12th July, 1957, is an instrument chargeable as a conveyance under (Article 19 of Schedule 14) Article 23 of Schedule 1 or as a release under Article 55 of Schedule 1 of the Indian Stamp Act:

The Additional Government Pleader, for Referring officer.

T. M. Seshadri Iyengar and *M. A. Rajagopalan* for *M/s. Pais, Lobo & Alwares*, for Respondent.

The Judgment of the Court was delivered by

Anantanarayanan, C. J.—The case referred to us under section 57 of the Indian Stamp Act involves this question, whether a particular document is an instrument chargeable as a conveyance under Article 23 of Schedule I (Previous Article 19 of Schedule I-A) of as a release, under Article 55 of Schedule I of the Indian Stamp Act. We have had the benefit of elaborate arguments on this matter, and, apart from facts which we shall presently refer, and which are explicit and clear, the question also involves the interpretation of what amounts to a release in law, as distinguished from a conveyance or transfer of property for value, there are one or two leading authorities available on this aspect, to which also we shall make a brief reference.

In order to have a clear picture of the preceding facts, we might immediately take up the settlement dated 5th April, 1955, which is among the papers, and which involves one N. K. Patel and his two sons, K. N. Patel (first son) and R. N. Patel (second son). Under this settlement deed, it is recited that there are certain immovable properties, of which the settlor (N. K. Patel) and his first son (K. N. Patel) are co-owners and joint tenants, with a right of survivorship reserved to the surviving party. The settlor, out of natural love and affection for the second son (donee), makes this settlement of his undivided half share in the properties, the other co-owner (the first son) joining in the instrument, as, thereby, the right of survivorship comes to an end. The document proceeds to state that the donee will thereafter hold the property, along with the first son, as tenants-in-common, in equal shares.

The next document that we have to scrutinise is the document dated 12th July, 1957, which is the instrument under analysis. This instrument refers to a mortgage dated 14th July, 1955, and the releasee (first son) assigns this mortgage to the releaser (second son) which forms the element of consideration for the release itself. We need not further dwell on this aspect. The learned Counsel for the State (Sri Ramaswami), does not contend that a release deed is valid only when it is gratuitous. Admittedly, a release deed can be validly executed also for some benefit accruing to the releaser, simultaneously. After having recited this the donee (second son) (releasor) purports to release his undivided half share and interest in the entire property, in favour of the first son (releasee). The document proceeded to state that the amount secured under the mortgage (Rs. 51,250) forms the consideration, in the sense that this half share itself is valued at about that figure. Admittedly, the entire estate was acquired for a much less amount several years earlier, and both the co-owners claim to have spent monies on the estate, resulting in a considerable enhancement of its value.

The question that falls to be decided by us is whether this instrument must necessarily be construed as amounting to a conveyance, and assessed for stamp as such, or could be accepted as a release under Article 55 of Schedule I. It is not in dispute that the nomenclature is not decisive nor the language which the parties may choose to employ, in framing the document. What is decisive is the actual character of the transaction, and the precise nature of the rights created by means of the instrument.

Of the several authorities that have been referred to before us, the decision of the Full Bench in *Board of Revenue* v. *Murugesa Mudaliar*[1], would appear to be the most relevant, and indeed, virtually decisive of the issue. There also the Full Bench was concerned with a transaction between co-owners, with regard to property under which these co-owners held undivided shares, and there had been no division by metes and bounds. The relevant cannon was stated by Rajamannar, C.J., in the following form :

> " In such a case there need be no conveyance as such by one of the co-owners in favour of the other co-owners. Each co-owner in theory is entitled to enjoy the entire property in part and in whole. It is not therefore necessary for one of the co-owners to convey his interest to the other co-owner. It is sufficient if he releases his interest. The result of such a release would be the enlargement of the share of the other co-owner. There can be no release by one person in favour of another who is not already entitled to the property co-owner."

In the last paragraph of this decision, there is some reference to the parallel case of a Hindu coparcenary, where one member purports to relinquish his rights in the family property in favour of the remaining coparceners. The learned Judges finally proceeded to observe :

> " We can see no difference in principle between such a document as between members of a coparcenary and, the document in question, which is a document between co-owners."

Finally, the learned Judges held that the document was a release, not liable to be charged either as a deed of dissolution of partnership, or as a conveyance.

Another very relevant decision is that of the Supreme Court in *Kuppuswami Chettiar* v. *Arumugham Chettiar*[2], not reported in full text so far. Their Lordships were concerned with the nature of a document of release, and they approbated the observations that " a release deed can only feed title but cannot transfer title." and also that " remuneration must be in favour of a person who had already title of the estate, the effect of which is only to enlarge the right." Their Lordships further proceeded to observe, with great significance for the facts of the present case, that " it cannot be disputed that a release can be usefully employed as a form of conveyance by a person having some right or interest to another having a limited estate, *e.g.*, by a remainderman to a tenant for life, and the release then operates as an enlargement of the limited estate."

In the present case, *prima facie* it may be contended with great force and plausibility that the document rightly purports to be a release, and should be received as such. For it cannot be disputed, we think, that the estate in question is owned by two parties or co-owners that the releasee has already an undivided half share in the estate, and that what the releasor purports to do by the document is to efface himself, in respect of both his title and his right to possession, in favour of the releasee. Nevertheless, Sri Ramaswami for the State has contended, upon two main lines of reasoning, that the document has to be interpreted as a conveyance, or should be held essentially to be such. The first line of reasoning is based upon the distinction well-known to law, borrowed from the English Law of Real Property, between a joint tenant and a tenant-in-common. This distinction has also been applied to

1. I.L.R. (1955) Mad. 1133 : (1955) 2 M.L.J. 166.

2. Since reported in (1967) 2 S.C.J. 5: (1967) 2 M.L.J. (S.C.) 29.

the concept of a Hindu coparcenary as existing before a division in status, and the state of rights between erstwhile coparceners after division in status, as would be apparent from cited passages in Mulla's Hindu Law. The other line of reasoning is that, upon the actual phraseology of Article 5 of Schedule I, such a document as this cannot amount to a release.

We have carefully examined these arguments, and we do not find them to be substantial. No doubt, there is a well understood distinction between tenancy in-common and a joint tenancy, and our attention has been drawn to the relevant passage or entry, in Jowitt's Dictionary on English Law, page 1728. It is pointed out there :

> " Tenancy-in-common differs from joint tenancy, in that joint tenants have one interest in the whole and no interest in any particular part. Tenants-in-common have several and distinct interests in their respective parts—Tenants-in-common held by unity of possession, because neither of them knows his own severally."

Our attention has also been drawn to one passage upon this aspect, setting forth an extract from Halsbury in *State of Madras* v. *Subramania Ayyar*[1] to which one of us was a party.

We do not think that this distinction in really significant on the present facts, and it need not be pressed very far in the present case. To the extent of the present facts, these two parties are co-owners, with a title which cannot be demarcated or fixed, with reference to any particular part of the property. In other words, there is a joint possession that can only be served by partition, and further commonalty of title, in the sense that the title and of the releasor is derived from the father, who jointly held the property with the other son, the release. In that context therefore, we do not think that the mere fact that these persons can be described in a certain sense as tenants-in-common would convert a document which purports to be a document of release, into a conveyance.

On the contrary, we may emphasise that the essential ingredients of release are here present. There is already a legal right in the property vested in the releasee, and the release operates to enlarge that right into an absolute title for the entire property, as far as the parties are concerned.

The next argument of the learned Counsel that this kind of release does not fall within the ambit of Article 55 of Schedule I, appears to be devoid of substance. Article 55 refers to release, that is to say " any instrument............whereby a person renounces a claim upon any other person, or against any specified property". We do not think that this means that a releasor cannot validly state, in the instrument, that he is effaeing his rights in the property, in favour of another named individual. There is an entity known to law as a document of Release, and we have no reason to think, that, by this Article, that entity was not indicated but only one particular kind of subspecies release, wherein the person in whose favour the release is declared on intimated is not designated by identity or name.

We would, therefore, unhesitatingly answer the question, in the form that the document was rightly interpreted as a release under Article 55 of Schedule I of the Indian Stamp Act and is liable to duty as such.

R.M. *Answered accordingly.*

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1. (1965) 1 M.L.J. 566 : (1965) 1 I.T.J. 698 : I.L.R. (1965) 1 Mad. 648.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

The Secretary, Madurai General Workers' Union, Madurai .. *Petitioner**

v.

The Management of Brinda Textiles Handloom Factory, Madurai, by sole Proprietor, and others .. *Respondents.*

Constitution of India (1950), *Article* 226—*Scope—Reference of dispute to Labour Court—Whether persons mentioned in the reference are 'workmen' under section* 2 (*s*) *of Industrial Disputes Act and whether they voluntarily abandoned their work—Findings of Labour Court on—Interference with under the Article.*

Industrial Disputes Act (*XIV of* 1947), *section* 2 (*s*)—"*Workmen*" *under—Who is—Tests to determine.*

Where an industrial dispute is referred for adjudication by the Labour Court the question whether the persons mentioned in the reference were "workmen" as defined in section 2 (*s*) of the Industrial Disputes Act, involves a decision on jurisdictional issue and the High Court in exercise of its writ jurisdiction, can re-examine the finding of the Labour Court on this issue on the merits and arrive at an independent conclusion.

But a finding by the Labour Court that the workers concerned voluntarily stayed away from work is one of fact and cannot be interfered with under Article 226 of the Constitution.

The maintenance of a regular attendance register with a provision for entering the names of those who had left the service of the management will indicate, *prima facie* that the relationship between the workers and the management was one of a contract of service and not a contract for service.

In the instant case the workers are paid on piece work basis but there is reguarity of attendance. They have got to work on specified warps supplied by the management. They have freedom to weave as many pieces as they like, but the piece of cloth they weave is restricted to two qualities. Fixed hours of work are alloted to them. When they came late beyond a certain hour they are not given any work. There is a weekly holiday and a muster roll is maintained. There is a record of workers being removed from service from time to time. Even though there is no direct evidence that when the weavers are engaged at the looms someone on behalf of the management was constantly supervising the work, it will be implicit from the regularity of attendance and from the fact that the weavers were weaving pieces on the warps supplied by the management and that they were paid according to the quality of the cloth woven, that the management would have control in seeing that the warp supplied by them was not wasted or spoiled, but was put to proper use so that goods saleable in the market and of standard quality are woven out of the warp. The circumstances therefore clearly justify the finding that the employees in this case are "workmen" as defined in section 2 (*s*) of the Industrial Disputes Act.

Query: On the death of a previous manager (who was also the proprietor) of an establishment, legal representatives of the former manager, how far liable to meet any claim which may arise at the instance of workers by reason of their wrongful dismissal by the former manager, when the establishment itself has ceased to exist.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records connected with the

* W.P. No. 1589 of 1964. 24th March, 1967.

Award passed by the Presiding Officer, Labour Court, Madurai, dated 6th August, 1963 and made in I.D. No. 30 of 1962 and quash the award; and to award the costs of this petition.

S. Ramaswamy, for Petitioner.

O. V. Baluswamy, for Respondents 3 to 7.

The Court made the following

ORDER.—The petitioner in this Writ Petition is the Secretary, Madurai General Workers' Union, Madurai. The first respondent is the Management of Brinda Textiles Handloom Factory, Madurai, and the second respondent is the Presiding Officer, Labour Court, Madurai. After the writ petition was filed, one P. R. Krishnamurthi, who was the sole proprietor of the first respondent, died and his legal representatives, namely, his widow and children were brought on record as respondents 3 to 7, in the writ petition.

On the initiative taken by the petitioner Union, the Government of Madras referred to the Labour Court, Madurai, for adjudication the questions whether the non-employment of eighteen workers (whose names were appended) was justified and to what relief each was entitled and to compute the relief, if any, awarded in terms of money, if it could be so computed.

A brief reference to the facts that preceded the above reference can now be made. The eighteen workers, according to the management, went on strike on 14th December, 1961. The management on that day repeatedly issued notices to the workers to resume work, but, since they refused, the management declared a lock-out at 7 P.M. This state of affairs continued for about a week. Then on the intervention of the Conciliation Officer, the lock-out was lifted with effect from 21st December, 1961. At the same time, the management treated the case of seven of the workers in a category different from the case of the remaining eleven workers. According to them, even after the lifting of the lock-out, the seven workers who were the cause of the trouble would be proceeded against by issuing show-cause notices, but they were prepared to take back the remaining eleven workers.

What happened thereafter was that the management dismissed the seven workers from service. But the eleven workers, against whom the management did not propose to take any action, did not report for duty even though the management was prepared to take them back for duty. The management, apparently, also contended at the time of the enquiry before the Labour Court, as they did before me, that all the eighteen workers were not really workmen as defined in the Act, but were only engaged on a contract basis for doing specified work for which they were paid at certain rates according to the out-turn of work and the quality.

Taking the above specific pleas raised before it, the Labour Court framed the following issues:

(1) Are the eighteen persons in the reference workmen ?

(2) Did eleven workers not resume work in spite of the respondent's notice to resume work ?

(3) Is the dismissal of the other seven workers justified ?

(4) To what reliefs are the eighteen persons entitled ?

The Labour Court found, after considering the evidence adduced before it, that all the eighteen persons were not workmen within the definition of the Act. In regard to the second issue, it found that the eleven workers, in spite of the management's notice, voluntarily stayed away from work. In regard to the third issue, the Labour Court found that the management had not produced any charge-sheet or any show-cause notice given to the seven workers specifying the charges. Even in the questions put to them, charges were not stated in any specific form and the workers were thus placed at a very great handicap. In view of the above

considerations the Labour Court found that the dismissal of the seven workers was not at all justified.

However, relying on the finding on the first issue that the workers were not workmen as defined in section 2 (*s*) of the Industrial Disputes Act, the Labour Court was of the opinion that none of the workers in the case was entitled to any relief and passed an award accordingly.

Against the above decision of the Labour Court, the petitioner Union has filed the present writ petition for quashing the order of the Labour Court by a writ of *certiorari*.

Learned Counsel appearing for the petitioner, urges that the question whether the eighteen persons mentioned in the reference of the Government were workmen as defined in section 2 (*s*) of the Industrial Disputes Act, involves a decision on jurisdictional issue and that this Court in exercise of its writ jurisdiction, can re-examine the finding of the Labour Court on this issue on the merits and arrive at an independent conclusion. This position is well recognised by authorities and it is not necessary to cite them in this order. The respondent's learned Counsel also is not in a position to dispute this broad legal proposition.

Taking up the evidence adduced in this case, it appears that the nature of the business conducted by the first respondent involves working by a number of weavers on looms which the first respondent has located in his factory. An attendance register is maintained which purports to be a muster roll prescribed under rule 103 of the Madras Factories Rules, 1950. The names of the workers in the weaving section are entered in this register and their daily attendance is noted. Now and then, some workers have been noted as having left the service. There is a separate page for clerks, and for workers engaged in the warp section. The maintenance of such a register is a strong piece of evidence to show that the management had been dealing with the workers now under consideration as workers regularly employed day by day. The maintenance of a regular attendance register with a provision for entering the names of those who had left the service of the management will indicate *prima facie* that the relationship between the workers and the management was one of a contract of service and not a contract for service.

W.W. 1 for the Union deposed that he had been working in the concern for six years and that he was getting on an average Rs. 2 to Rs. 2-8-0 per day, or Rs. 60 to Rs. 70 per month. The workers used to go to work at 8 A.M. They have a lunch interval between 12 noon and 1 P.M. and then they work from 1 P.M. to 5 P.M. If a worker comes half an hour late he would not be provided with work and if his work is refused he would not get any wages for the day. W.W. 2 stated that wages used to be paid according to the number of articles woven. There is no stipulation as to the number of pieces to be woven. A weaver can weave any number of pieces a day. The management prepares the warp and supplies it to the workers, but no wages will be paid on the days when the warp preparation goes on and there is no work for the weavers. W.W. 3 stated that the wages would be paid according to the quality of the cloth woven and she used to weave ten cloths of special variety and twenty cloths of the bazaar variety. Every day the workers used to sign in the acquittance register for the receipt of wages.

The management examined the Head Clerk as M.W. 2. He filed the register, M. 25, the muster roll for the period 1st November, 1960 to 30th June, 1961. He deposed that the weekly holiday for Brinda Textiles was on Sunday. M.W. 1 a worker in the Textiles stated that it was his duty to open the factory, but that there was no fixed time to close the factory.

It will be clear from the above evidence that the workers are paid on piece work basis, but there is regularity of attendance; they have got to work on specified warps supplied by the management. They have got freedom to weave as many pieces as they like, but the pieces of cloth they weave are restricted to two qualities, bazaar variety and special variety. They are given wages according to the number

of pieces woven by them and the quality. Fixed hours of work are allotted to them. They have got lunch interval. When they come late beyond a certain hours, they are not given any work. There is a weekly holiday and a muster roll is maintained. There is a record of workers being removed from service from time to time. There are also a Head Clerk and an Accountant, who, in all probability, have to work in the premises of the factory itself.

Learned Counsel appearing for the management stressed that there is no evidence to show that the management exercised any control or supervision over the workmen in the factory and that such control or supervision would be one of the crucial tests for determining whether the workers are workmen or merely contractors. He referred to the observations of the Supreme Court in *D.C. Dewan Mohideen Soheb & Sons* v. *United Bidi Workers, Union*[1], as well as *Birdhichand Sharma* v. *First Civil Judge, Nagpur*[2]. The latter decision followed the Supreme Court decision in *Dharangadhara Chemical Works* v. *State of Saurashtra*[3], which held that the definition of workmen itself implied the relationship of master and servant or employer and employee and that it was not enough that a person was merely working in the premises belonging to another person. A distinction was drawn between a workman and an independent contractor. At page 88 of the report it is observed :

> " Respondents 2 to 4 have to work at the factory and that in itself implies a certain amount of supervision by the management. Their attendance is noted and they cannot get the work done by others but must do it themselves. Even though they are not bound to work for the entire period during which the factory is open, it is not in dispute that if they come after midday they are not given any work and thus lose wages for that day, the payment being at piece rates. Further, though they can stay away without asking for leave, the management has the right to remove them if they so stay away for a continuous period of eight days. Lastly, there is some amount of supervision inasmuch as the management has the right of rejection of the *biris* prepared if they do not come up to the proper standard."

The decision goes on to observe that what is important in such cases is the right to supervise and not so much the mode in which it is exercised that is important for applying the definition in section 2 (*s*) of the Act.

In *D. C. Dewan Mohideen Sahib & Sons* v. *United Bidi Workers' Union*[1], stress was laid upon the conduct of the manufacture which showed that the employees were treated as workmen. In the present case it is significant that the management had throughout treated the workers as workmen with the right to frame charges against them for misconduct and remove them from service and note that fact in the attendance register regularly kept for their attendance. Even though there is no direct evidence that when the weavers were engaged at the looms someone on behalf of the management was constantly supervising the work, it will be implicit from the regularity of attendance and from the fact that the weavers were weaving pieces on the warps supplied by the management and that the weavers were paid wages according to the quality of the cloth woven, that the management would have control in seeing that the warp supplied by them was not wasted or spoiled, but was put to proper use so that goods saleable in the market and of standard quality are woven out of the warp. I am of opinion that the circumstances clearly justify the finding that the employees in this case are workmen as defined in the Act. I, therefore, reverse the finding of the Labour Court on this point and hold that the Labour Court had jurisdiction to go into the question.

Regarding the second issue, the award of the Labour Court in paragraph 8 of the order, clearly shows that after intervention of the Labour Officer the management offered to take back the eleven workers excluding the seven workers, against whom they were proposing to take some action. The management also has given

1. (1964) 2 L.L.J. 633.
2. (1963) M.L.J. (Cr.) 112 : (1963) 1 S.C.J. 178 : (1961) 3 S.C.R. 161 : (1961) 2 L.L.J. 86.
3. (1957) S.C.J. 208 : (1957) 1 L.L.J. 477.

evidence to show that the eleven workers declined to accept the offer of employment. The eleven workers thus concerned seem to have claimed that they did not get any individual notice calling upon them to come back and report for work. On the other hand, the management gave evidence that as the address of the workers was not known, notices were first of all affixed at the factory gate. The management also relied on Exhibits W.9 to W. 10, notices sent by the management to these eleven workers later, on 11th January, 1962, directing them to report for work. The evidence of the worker, W.W. 2 was that in reply to this notice the eleven workers went to work, that the management asked them to give letters of apology, but, since they refused to do so, they were not given work. As against this, on 19th January, 1962 the management seems to have sent a notice stating that it was untrue to say that they had insisted upon an apology, before these eleven workers were allowed to work again. The question whether the management or the workers have given the right version on this aspect of the case must depend upon the appreciation of evidence. The finding of the Labour Court based upon the evidence is that the plea of the workers that they went for work and they were refused work was not acceptable and that the circumstances indicated that the eleven workers had voluntarily stayed away from work. This is a finding of fact and it is not possible for me in writ proceedings to interfere with that finding and decide that the plea of abandonment is not sustainable or established on the evidence. I, therefore, hold on this point that this is a case of abandonment of their work by the eleven workers and that they are not entitled to any relief.

However, on the third point it appears to me that the matter requires further investigation. I have already mentioned the fact that after the filing of the writ petition the proprietor of the concern, one Krishnamurthi, died and his widow and children have been brought on record. They have also pleaded that the factory has ceased to exist on account of some reason or other. The reference made to the Labour Court by the Government will involve the determination in the case of the seven workers whether the management was justified in not employing them and to what relief the workers would be entitled. The Labour Court would also be required to compute the relief, if any, to be awarded in terms of money, in the case of these seven workers. The question as to how far the legal representatives of the former manager would be liable to meet any claims which may arise at the instance of the seven workers by reason of their wrongful dismissal by the former manager will depend upon a variety of circumstances including questions of fact and of law. Since the factory is non-existent there can be no question of their re-employment. The question whether they can claim compensation for non-employment will again depend upon several circumstances including how far the liability to pay compensation is a personal liability or a liability which, in the event of the death of the previous manager, can be passed on to his heirs to be realised from the assets of the business in the hands of the heirs. All this will require further consideration and they cannot be decided by me in the writ petition. It will also require specific pleadings by both parties.

Learned Counsel, Sri Baluswamy appearing for the respondent Management referred me to the decision of Srinivasan, J., in *Vridhachalam* v. *State of Madras*[1], where the learned Judge held that on the death of the petitioner the writ petition itself came to an end, and dismissed the writ petition. That case, however, dealt with a police constable who claimed that he had been wrongfully dismissed by the Government, his employer. Pending the writ petition the constable died. The learned Judge observed that the right which the constable claimed for reinstatement in view of the wrongful dismissal involved the continuance in service or otherwise which could not survive to the legal representatives. Even if the enquiry was to be held afresh for determining whether he was properly dismissed or not, the State would be placed in an anomalous position in not being able to continue the proceedings against the officer even if a writ should be granted. It was under such circumstances

1. (1965) 2 M.L.J. 302.

that the learned Judge dismissed the writ petition. In the present case too it can be held that no remedy by way of reinstatement can be granted to the seven workmen by the Labour Court. But the finding that the seven workers concerned in this dispute were workmen as defined in the Act and that they have been wrongfully dismissed by the previous management without proper enquiry will necessarily lead to the result that the matter must be restored to the file of the Labour Court for fresh disposal in regard to the case of these seven workers. It will be open to the Labour Court to take evidence, if necessary, about the alleged misconduct of these workers and come to a conclusion, if the Labour Court finds that the management itself has not conducted the necessary enquiry according to the proper procedure in that matter. Secondly, the Labour Court will have to consider how far any relief can be granted to these workers which will bind the legal representatives of the former manager after his death. The Labour Court will have also to take into account that the undertaking itself has ceased to exist. Reference was also made in this connection to section 18 (3) (*c*) of the Industrial Disptues Act which states that the award of a Labour Court shall be binding, where the party referred to is an employer, on his heirs, successors or assigns in *respect of the establishment* to which the dispute relates. The legal implication of the provision in section 18 (3) (*c*) of the Act will also have to be considered, namely, how far the heirs on record can be viewed as heirs in respect of the establishment, so as to be held bound by the award when the establishment itself has ceased to exist.

For the aforesaid reasons I allow the writ petition and quash the order of the Labour Court so far as the first seven workmen mentioned in the reference are concerned. It will be open to the Labour Court to restore the reference to its file and dispose it of according to law and in the light of the observations mentioned above.

In regard to the liability of the legal representatives for any relief since the matter has arisen only after the filing of the present writ petition, it will be open to the concerned parties to adduce such evidence before the Labour Court as is necessary for deciding the question. There will be no order as to costs.

V.K. — *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE RAMACHANDRA RAO.

Messrs. The Tirukoilur Oil Mills Ltd., Arakandanallur, and another .. *Petitioners**

v.

The State of Madras represented by the Deputy Commissioner of Commercial Taxes, Madras, and another .. *Respondents.*

Central Sales Tax Act (*LXXIV of* 1956), *sections* 8 (4) *and* 13 (4) (e)—*Concessional rate of tax under—When can be claimed—Scope of—Power of State Government to make rules—If State Government could fix a time limit for complying with the requirements of section* 8 (4)—*Delay in submitting* ' *C* ' *form declaration or rectifying defects in such declaration—If will disable the assessee from claiming the concessional rate of tax.*

Central Sales Tax (*Madras*) *Rules*, 1957—*Rule* 5 (1) —*Validity— Time-limit for submitting returns and declaration—Validity—Delay in submitting the declaration if an absolute bar to claim the benefit of lower rate of tax.*

Words and Phrases—" manner and form "—*Meaning of.*

It is no doubt true that in order to claim the benefit of the reduced rate of tax under section 8 (1) of the Central Sales Tax Act, the conditions prescribed under section 8 (4) of the Act should be complied with, *viz.*, that the dealer should furnish to the prescribed authority in the prescribed manner a declaration in the prescribed

* Tax Case Nos. 8 and 9 of 1964. 22nd June, 1967
Revision Nos. 3 and 1.

form. Non-compliance with this requirement will attract the higher rate of tax prescribed under sub-section (2) of section 8.

Section 13 (4) (*e*) of the Act authorises the State Government to make rules in this regard. Rule 5 (1) of the Central Sales Tax (Madras) Rules, 1957, evidently has been framed under this authority. In substance the rule provides that along with the monthly returns, which should be filed on or before the 25th of cach month, declarations in the prescribed form (Form C) should also be filed. An exception is, however, made in case of dealers maintaining a register in Form 9. But the State Government has no authority under the rule-making power available to it to prescribe any such time-limit for filing the declaration in Form ' C ' The expression ' in the prescribed manner ' in section 13 (4) (*e*) of the Act does not comprehend any element of time. The words ' manner and form ' refer only to the mode in which the thing is to be done and do not refer to the time for doing it.

Stroud's Judicial Dictionary, Volume III, *Acraman* v. *Herniman*, 16 Q.B. 1003 : (1851) 117 E.R. 1164, Referred.

Hence rule 5 (1) of the Central Sales Tax (Madras) Rules, 1950, in so far as it prescribes a time-limit, is invalid as being in excess of the rule-making power of the State Government.

Sales Tax Officer, Penkunnam and another v. *K. I. Abraham*, (1967) 20 S.T. 367 at 372, *Abraham* v. *Sales Tax Officer*, (1964) 15 S.T.C. 110 (F.B.), followed.

Deputy Commissioner of Commercial Taxes v. *Manohar Brothers*, (1962) 13 S.T.C. 686 ; *Deputy Commissioner (Commercial Taxes)* v. *Parekutti Hajee Sons*, (1962) 13 S.T.C. 680, held not good law.

Hencc an assessee can file the declaration in Form ' C ' within a reasonable time. Where the assessee files the declaration before the order of assessment was made he would be entitled to claim the benefit of the lower rate of tax. Where the declarations filed were found to be defective for the first time in appeal, the assessee should be given an opportunity to file the correct declaration and the assessee is entitled to file the declaration within a reasonable time. What will be ' reasonable time ' in a given case will depend on the circumstances of each case. If the defects are known before the assessement is made, it is the duty of the assessee to rectify the same before the assessment. But if the defects are noticed for the first time at the appellate stage, the appellate authority is bound to give the assessee an opportunity to furnish the correct particulars. It is not possible to lay down as a rule of law as to what is a ' reasonable time ' since circumstances may exist in particular cases which may justify extension of the scope of ' reasonable time.'

T.C. No. 8 *of* 1964 :—Petition under section 38 of Madras Act I of 1959 (rule 30) praying the High Court to revise the order of the Sales Tax Appellate Tribunal, Madras, dated 21st June, 1963 and made in T.A. No. 361 of 1962 preferred against the order of the Appellate Assistant Commissioner (Commercial Tax), Madras-1 relating to the Assessment year 1959-60 in his Appeal No. (Thanjavur) C.S.T. 2/61-62, dated 25th December, 1961 (C.S.T. No. 1333/59-60, dated 31st March, 1961 of the Deputy Commercial Tax Officer, Tirukcilur).

T.C. No. 9 of 1964 :—Petition under rule 30, section 38 of the Madras General Sales Tax Act, 1959 (Madras Act I of 1959) to revise the order of the Sales Tax Appellate Tribunal, Madras, dated 3rd July, 1963 and made in T.A. No. 635 of 1962 preferred against the order of the Appellate Assistant Commissioner (Commercial Tax), Tirunelveli relating to the assessment year 1959-60, in his Appeal No. A.P.C.S.T. 62/61-62 dated 19th March, 1962 (Assessment No. C.S.T. 737/59-60 dated 15th November, 1961 of the Commercial Tax Officer, Ramanathapuram at Virudhunagar).

R. S. Venkatachari, for Petitioner in T.C. No. 8 of 1964.

Padmanabhan, for Petitioner in T.C. No. 9 of 1964.

K. Venkatasami, for the Additional Government Pleader, for Respondents.

The Order of the Court was made by

Veeraswami, J.—To a considerable extent our task in these petitions is lightened, because of two recent judgments of the Supreme Court, which cover two of the substantial points argued in them.

In T.C. No. 8 of 1964, which relates to the assessment year 1961-62, the assessee who is the petitioner, disputed the tax on five items of turnover, before the Tribunal. The assessing authority determined the net turnover to be Rs. 1,57,105·71 of which Rs. 1,47,979·71 was held liable to tax at one per cent. and the balance of Rs. 9,126 at seven per cent. The turnover charged to the higher rate related to two sales both dated 29th December, 1959, one for Rs. 4,590 and the other for Rs. 4,536 made by the assessee to a purchaser in the State of Kerala. In respect of the aggregate turnover of the two sales, a single declaration in Form 'C' was filed before the assessing authority along with the connected monthly return. But when the assessing authority indicated to the assessee that the declaration was not in compliance with the proviso to rule 10 (1) of the Central Sales Tax (Madras) Rules, 1957, he obtained fresh but separate declarations in Form 'C' for each of the two sales and tendered them to the Officer, before he completed assessment. He declined to accept the fresh declarations apparently on the ground that they were not filed along with the monthly returns as required by rule 5 (1) of the said Rules and that no discretion in him vested to condone the delay in the late filing. The sum of Rs. 1,47,979·71 included three items of turnover totalling Rs. 48,681.08 in respect of which declarations in Form 'C' were filed and accepted by the assessing authority. In an appeal filed by the assessee, the Appellate Assistant Commissioner of Commercial Taxes found the position of the assessee to be worse, and enhanced the turnover chargeable to the higher rate. Apart from the sum of Rs. 9,126 which he held to be chargeable at 7 per cent. he added to the chargeable turnover at that rate Rs. 8,295.15 as referrable to excise duty not eligible for deduction and another sum of Rs. 48,681.08 which, as we already mentioned, pertained to three items of turnover. In his view, the assessing authority was right in charging the sum of Rs. 9,126 at the higher rate. This Court in *Khader & Co.* v. *State of Madras*[1], held that there was no provision in the Central Sales Tax Act or the Rules made thereunder for deduction of excise duty from chargeable turnover. It appears, in fact, that so far as the amount of the excise duty was concerned, the assessee admitted liability before the Appellate Assistant Commissioner. Though a ground has been taken on this matter before the Tribunal and also in this Court, it has not actually been pressed, Counsel for the assessee realising that in view of the admission of the assessee and also *Khader & Co.* v. *State of Madras*[1], it will not avail him to urge it any longer. The assessee failed to get relief before the Tribunal in respect of the other two sums of turnover—Rs. 9,126 and Rs. 48,681.08. In dismissing the appeal, the Tribunal purported to follow *Deputy Commissioner (Commercial Taxes)* v. *Parekutti Hajee Sons*[2] and *Deputy Commissioner of Commercial Taxes* v. *Manohar Brothers*[3], both to the effect that non-compliance with the requirements of section 8 (4) read with rule 5 (1) would disentitle a dealer to the benefit of section 8 (1).

The 'C' Forms which covered the three items of turnover totalling Rs. 48,681.08 were according to the Appellate Assistant Commissioner, with whom the Tribunal agreed, defective in that in all of them the registration number and the date of registration of the out-of-State purchasing dealer were not given, and in one case the value of the goods sold as noted in the 'C' Form differed from the relative invoices. The assessee, in all the three cases, filed before the Appellate Assistant Commissioner original letters obtained from the out-of-State buyers showing the dates of registration, and also explained to him how the discrepancy in the figures in one of these cases occurred between that mentioned in the 'C' Form and the invoice. But, as we have mentioned, the Appellate Assistant Commissioner was not minded to receive the additional evidence making up the deficiency found by him, as, in his opinion, he had

1. (1966) 1 M.L.J. 541 : I.L.R. (1967) 1 Mad. 709 : (1966) 17 S.T.C. 396.
2. (1962) 13 S.T.C. 680.
3. (1962) 13 S.T.C. 686.

no power or jurisdiction to condone the delay in filing accurate 'C' Forms within the time prescribed.

From the facts we have narrated, two points arise: (1) the propriety in rejecting the 'C' Form declarations relating to the two sales for a total consideration of Rs. 9,126, and (2) the propriety of the Appellate Assistant Commissioner declining to receive additional documents filed to rectify the defects found for the first time by the Appellate Assistant Commissioner in the relative 'C' Forms.

We will consider the second point first. Section 8 (1) of the Central Act charges inter-State sales to a registered dealer other than the Government goods of the description referred to in sub-section (3) at one per cent., as the section stood at the relevant time. It is not stated before us that the goods sold by the assessee were not of the kind within the scope of sub-section (3). But the rate of one per cent. will be applicable only if the conditions prescribed therefor by sub-section (4) of section 8 are complied with. The sub-section requires in order that sub-section (1) may apply that the dealer selling goods furnishes to the prescribed authority in the prescribed manner a declaration duly filled and signed by the registered dealer to whom the goods are sold containing the prescribed particulars in a prescribed form obtained from the prescribed authority. Non-compliance with this requirement will attract the higher rate of tax, namely 7 per cent. provided by sub-section (2) of section 8. Section 13 (4) (*e*) authorises the State Government to make rules relating to the authority from whom the conditions subject to which and the fees subject to the payment of which any form of declaration prescribed under sub-section (4) of section 8 may be obtained the manner in which the form shall be kept in custody and records relating thereto maintained the manner in which any such form may be used and any such declaration may be furnished. Evidently in exercise of the authority conferred by section 8 (4) and section 13 (4) (*e*) the State Government framed the Central Sales Tax (Madras) Rules, 1957. Rule 5 (1) is as follows :—

> " Every dealer (other than those specified in the proviso to rule 11 of the Central Sales Tax (Registration and Turnover) Rules, 1957) registered under section 7 of the Act shall submit a return of his transactions in the course of inter-State trade or commerce or in the course of export of the goods out of the territory of India in Form I together with the connected declaration form (or duplicate of such form where the original has been lost) (and the certificates in Forms D, E-I and E-II) so as to reach the assessing authority on or before the 25th of each month showing the turnover for the preceding month and the amount or amounts collected by way of tax together with a chalan or a crossed cheque in favour of the assessing authority for the payment of tax due thereon under the Act :
>
> (Provided that in respect of the sales during the half-year ending 31st March, 1959, the certificates in Forms E-I and E-II may be furnished at any time before the final assessment).".

In substance, this sub-rule requires that along with the monthly return which should be filed on or before 25th of each month, declarations in the prescribed form which in the present case is Form 'C' as prescribed by rule 12 (1) of the Central Sales Tax (Registration and Turnover) Rules, 1957, should also be filed. An exception to the requirement is to be found in rule 10 (2) under which if a dealer maintains a register in Form 9 in the prescribed manner, he could then file the declarations along with the final return.

Construing the foregoing statutory provisions, a Division Bench of this Court in *Deputy Commissioner (Commercial Taxes)* v. *Parekutti Hajee Sons*[1], was of opinion that failure to furnish declarations in 'C' Form along with the monthly return where rule 5 (1) applied, or along with the final return where rule 10 (2) was applicable, would involve forfeiture of the benefit of the lower rate of tax and would render the transaction liable to the higher rate. The Court observed :

1. (1962) 13 S.T.C. 680 at 684.

"The rule 5 (1) accordingly prescribes that along with the return of the turnover relating to any month, the connected declaration should be submitted so as to reach the assessing authority or before the 25th of the succeeding month. here is a rule setting out the manner in which the declaration should be furnished to the prescribed authority by the dealer selling the goods."

It was considered that the time-limit for filing the declarations should be complied with, as a condition to the eligibility to the lower rates of tax. This view was followed by the same Division Bench subsequently in *Deputy Commissioner of Commercial Taxes* v. *Manohar Brothers*[1]. The Kerala High Court in *Abraham* v. *Sales Tax Officer*[2], however, took a different view. In that case, tax was imposed at the higher rate of seven per cent. on a certain turnover, on the ground that the connected declarations in Form 'C' were not filed before the time prescribed by the Rules. Rule 6 (1) of the Central Sales Tax (Kerala) Rules, 1957, required that the monthly return should be filed on or before the 20th of each month and along with it the connected declaration forms. Three provisos were added to the sub-rule from time to time, and the last of them said that all declaration forms pending submission by dealers on 2nd May, 1960 should be submitted not later than 16th February, 1961. Actually, the assessee in that case filed the forms only on 8th March, 1961, before assessment was made. The delay in filing was explained as due to late receipt of the forms from the purchaser in Madras. But the explanation was not accepted and the higher rate of tax was applied. The assessee failed in his appeal and revision. Thereafter, he moved the High Court of Kerala under Article 226 of the Constitution, and the petition was eventually heard and disposed of by a Full Bench of three learned Judges of that Court. They held that neither section 8 (4) nor section 13 (4) (*e*) conferred authority on the State Government to prescribe time-limit for filing declarations in Form 'C'. They referred to the decisions of this Court, which we have noticed already, but were unable to accept the assumption made in them that the prescription of time for filing declarations was within the rule-making competence of the State Government. We may, at this stage, with respect, observe that before the Division Bench which decided the two cass, *Deputy Commissioner (Commercial Taxes)* v. *Parekutti Hajee Sons*[3], and *Deputy Commissioner of Commercial Taxes* v. *Manohar Brothers*[1] no argument was addressed to the Court as to the validity of the rules prescribing the time-limit. The view of the Kerala High Court was based on the interpretation of the expression 'in the prescribed manner' in section 8 (4) of the Act. The expression is also found in section 13 (4) (*e*). In the view of the Kerala High Court, the word 'manner' did not comprehend any element of time. Stroud's Judicial Dictionary and *Acraman* v. *Herniman*[4], were relied on in support of the interpretation. To quote Stroud : (at page 1729, Vol. 3) :

"The words in 'manner and form' refer only to the mode in which the thing is to be done, and do not introduce anything from the Act referred to as to the thing which is to be done or the time for doing it."

To the same effect was the judgment of Lord Campbell, C.J., in the Queen's Bench. The judgment of the Kerala High Court was affirmed by the Supreme Court in Civil Appeal No. 404 of 1966.: *Sales Tax Officer, Penkunnam and another* v. *K. I. Abraham*[5] Their Lordships held :

"........ the phrase 'in the prescribed manner' in section 8 (4) does not take in the time-element. In other words, the section does not authorise the rule-making authority to prescribe a time-limit within which the declaration is to be filed by the registered dealer."

On that view, the third proviso to rule 6 (1) of the Kerala Rules was declared to be *ultra vires* section 8 (4) read with section 13 (3) and (4) of the Central Act. Rule 6 (1) of the Kerala Rules is materially *ad idem* with rule 5 (1) of the Madras Rules. It is true

1. (1962) 13 S.T.C. 686.
2. (1964) 15 S.T.C. 110 (F.B.).
3. (1962) 13 S.T.C. 680.
4. (1851) 117 E.R. 1164: L.R. 16 Q.B. 1003.
5. (1967) 20 S.T.C. 367 at 372.

the Supreme Court was concerned with the third proviso to rule 6 (1) of the Kerala Rules. But the principle that the State Government has no authority under the rule-making power available to it to prescribed time-limit for filing declarations in Form 'C' is applicable to the construction of the Madras Rule 5 (1) with equal force. Applying the judgment of the Supreme Court, we hold that Madras Rule 5 (1) in so far as it prescribed time-limit, is invalid as being in excess of the rule-making power of the State Government. The Supreme Court, at the same time, pointed out:

> "In the absence of any such time-limit it was the duty of the assessee to furnish the declarations in Form 'C' within a reasonable time......"

In that case, of course, the assessee, as we already mentioned filed the declarations before the order of assessment was made, and so it was held that the assessee would be entitled to the benefit of the lower rate of tax.

In the instant case before us, declarations in Form 'C' in all these cases were filed before the assessing authority before assessment. The assessing authorty, in three cases, accepted the declarations as being in order, but in one he was of the view that the declaration was not in conformity with the proviso to rule 10 (1) and that the date of registration of the purchasing dealer was not also mentioned. But even in respect of that declaration, the assessee subsequently procured fresh declaration forms complying with the proviso to rule 10 (1). But they were rejected as being filed out of time. It is clear that inasmuch as these declarations, in conformity with the proviso to rule 10 (1), were filed before the assessment order was made, there was no question of any delay, and they should be held to have been filed within a reasonable time. The contrary view taken by the Revenue as well as the Tribunal cannot be supported. As regards the three other declarations accepted by the assessing authority, for the first time, the Appellate Assistant Commissioner had the credit of probing into and finding out that the 'C' forms were defective inasmuch as they omitted to mention the dates of registration of the out-of-State purchasing dealers. While he gave the assesee an opportunity to show cause why the higher rate should not be applied to the turnover covered by those declarations, when fresh particulars giving the dates of registration were furnished, he declined to accept them, as coming out of time. The question is whether in such circumstances it cannot be held that they were filed within a reasonable time. It is true, as the Supreme Court held, that normally the declarations as prescribed in the form and in the prescribed manner should be filed within a reasonable time. But what will be 'reasonable time' in a given case will depend on particular circumstances, and if the defects in the 'C' form are known before assessment is made, but still the assessee failed to furnish the correct particulars in spite of reasonable time being given to him before assessment is completed, it may be a case for application of the higher rate of tax. But even here, we would not like to lay it down as a rule of law, for, circumstances may exist which may justify extension of the scope of 'reasonable time'. In the instant case, the defects having been discovered for the first time at the appellate stage, before enhancing the rate applicable, the appellate authority in the appeal filed by the assessee was bound to give an opportunity—indeed such an opportunity was given in this case—for the assessee to furnish the correct particulars to conform with the Rules. Curiously, the Appellate Assistant Commissioner, having given the opportunity to the assessee, declined to accept the rectified 'C' Forms produced by the assessee. In our view, an appeal, after all, is, in a sense, an extension of the original jurisdiction, especially when the Appellate Assistant Commissioner reopened the order which was in favour of the assessee and when the appeal was one filed by the latter. Apart from that, even the principles of natural justice would require that when something is discovered at the appellate stage which exposed the assessee to the higher rate of tax, the dealer should be given an opportunity to rectify the defects within a stipulated time granted for the purpose. In our view, therefore, the fresh particulars furnished before the Appellate Assistant Commissioner, which rectified the defects in the 'C' Forms filed before the assessing authority, should have

been received and if they were found to be in order, the Appellate Assistant Commissioner should have confirmed the original order applying the lower rate of tax in respect of the three items of sales covering a total turnover of Rs. 48,681.08.

On the first point, apart from the fact that the relative declarations covering a turnover of Rs. 9,126 were filed before the assessment order was made, even the declaration forms, as were filed in the first instance before the assessing authority should be held to be in order. The Supreme Court in *State of Madras* v. *Nandlal & Co.*[1] has held that the proviso to rule 10 (1) in the context can apply only to a purchasing dealer within the State of Madras and not to a dealer in Kerala State. It would appear that the Supreme Court was of the further view that, if the effect of the proviso was to compel the Kerala dealer to give a declaration in Form 'C' as required by the proviso, it would not be within the competence of the rule making power. On this ground also the turnover of Rs. 9,126 would be liable to tax only at the rate of one per cent.

The Tribunal has not recorded any finding whether the declarations in Form 'C' as rectified were in order. The Tribunal only proceeded on the ground of time-limit. The petition is allowed and the appeal is remanded to the Tribunal for fresh disposal in accordance with this judgment. The petitioner is entitled to his costs. Counsel's fee Rs. 100.

T.C. No. 9 of 1964 is practically covered by our judgment in T.C. No. 8 of 1964. In respect of the turnover of Rs. 12,539.17, the higher rate of seven per cent. was applied, on the view that the connected declarations in Form 'C' were defective inasmuch as they did not give the dates of registration of the out-of-State buyers. The assessee, who is the petitioner, sought to rectify the defect at the stage of the appeal before the Appellate Assistant Commissioner. But he disallowed the assessee on the ground that the letters produced were belated and he had no power to condone the delay. The further appeal of the assessee failed on the same ground, the Tribunal relying on *Deputy Commissioner (Commercial Taxes)* v. *Parekutti Hajee Sons*[2], and *Deputy Commissioner of Commercial Taxes* v. *Manohar Brothers*[3]. On the view we have expressed in T.C. No. 8 of 1964, the Tribunal acted wrongly in dismissing the assessee's appeal on the only ground that the particulars to make up the defects in 'C' Forms were filed belatedly.

The petition is allowed and the appeal is remanded to the Tribunal for fresh disposal in accordance with law. We make no order as to costs.

R.M. *Petitions allowed; Appeals remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE T. RAMAPRASADA RAO.

Messrs. Ramalakshmana and Company, and another .. *Petitioners**

v.

The State of Madras by the Deputy Commercial Tax Officer, Karaikudi and another .. *Respondents.*

Madras General Sales Tax Rules, 1959, *rule* 6—*Excise duty paid by Commission Agent—If could be deducted from the turnover.*

It is true that a commission agent is also a dealer within the meaning of the Madras General Sales Tax Act and the turnover in his hands can be assessed to tax under the Act. But on this score the true nature of the transaction is not altered. The transactions which are put through by the commission agent

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1. A.I.R. 1967 S.C. 1758.
2. (1962) 13 S.T.C. 680.
3. (1962) 13 S.T.C. 686.

*Tax Cases Nos. 11 and 12 of 1965, Revision No. 9 of 1965. 7th July, 1967.

are really those of his principal. If the principal is entitled to claim deduction of excise duty from the turnover, the commission agent will also be entitled to claim such deduction in respect of the turnover in his hands. which is really the turnover of the principal. The fact that the commission agent was not the person who paid the excise duty, but his principal, does not mean that the same is not entitled to deduction from the turnover. The transactions being essentially those of the principal brought to tax in the hands of the commission agent, who is the dealer, the agent will be entitled to deduction of the excise duty paid in respect of the corresponding turnover in his hands.

T. C. No. 11 *of* 1965.—Petition under section 38 of the M.G.S.T. Act to revise the order of the Sales Tax Appellate Tribunal, (Additional Bench) Madurai, dated 21st January, 1964 and made in T.A. No. 991 of 1963 preferred against the order of the Appellate Assistant Commissioner of Commercial Taxes, Tiruchirapalli dated 31st May, 1963 and made in Appeal No. 21 of 63-64 preferred against the order of the Deputy Commercial Tax Officer, dated 15th December, 1962 and made in Assessment No. 6956/61-62.

T. C. No. 12 *of* 1965.—Petition under section 38 of the M.G.S.T. Act to revise the order of the Sales Tax Appellate Tribunal (Additional Bench), Madurai, dated 21st January, 1964 and made in T.A. No. 468 of 1963 preferred against the order of the Appellate Assessment Commissioner of Commercial Taxes, Tirunelveli, dated 23rd January, 1963 and made in Appeal No. 440/62-63 preferred against the order of the Deputy Commercial Tax Officer, Srivaikuntam II of the Tuticorin dated 16th October, 1962 and made in Assessment No. A.2-14847/61-62.

B. T. Seshadri, for Petitioner.

The Special Government Pleader, for Respondent.

The Order of the Court was made by

Veeraswami J.—Though the petitioners are different, as a common point arose their appeals were heard together by the Tribunal and the petitions directed against the appellate orders are also posted together. The common point is whether the assessee, who is a commission agent, and therefore, a dealer as defined in the Madras General Sales Tax Act, 1959 is entitled to deduction from the turnover of excise duty paid on the goods by the common principal. That excise duty is deductible from the turnover is not in dispute but the Tribunal took the view that inasmuch as the commission agent was not the person who paid the excise duty, he would not be entitled to ask for deduction under rule 6 of the Madras General Sales Tax Rules, 1959.

We are unable to accept that view. The transactions which were put through by the commission agent were really those of the principal and on his behalf. The commission agent will not normally be dealer, but for the purpose of assessment the expression 'dealer' has been so defined by the Act as to include a commission agent. On that account, the true nature of the transactions is not altered. Having defined a commission agent as a dealer in respect of transaction on behalf of his principal the Act provides for machinery to bring those transactions to tax at the hands of the commission agent as a measure of convenience. Once it is realised that the sales effected by the commission agent are really for and on behalf of the principal and the principal is entitled to deduction of excise duty from the turnover, it will at once become clear that the commission agent, who is assessed on the turnover, is also eligible to ask for deduction of excise duty from the turnover. The turnover is really the turnover of the principal and by a specific provision, that is taxed in the hands of the agent. That is why rule 6 itself provides that while assessing the principal, he is entitled to deduction of the turnover that has been brought to charge in the hands of the agent. If the Tribunal's view is accepted, we do not see how the provisions relating to deduction of excise duty and deduction of the commission agent's turnover from the turnover of the principal could properly be worked. If for instance a commission agent is not allowed to deduct the excise duty from the turnover in his hands which is brought to charge, and the principal

claims deduction of the entire turnover as provided by rule 6, he will, on the interpretation placed by the Tribunal on the rule, he entitled to claim deduction of excise duty also. If both deductions are made, the assessee will get a double advantage. Apart from this, we are of opinion that the transactions being essentially those of the principal brought to tax in the hands of the dealer, notwithstanding the apparent tenor of the relative rules, the commission agent as a dealer will be entitled to deduction of excise duty from the corresponding turnover in his hands.

The petitions are allowed. No costs.

R. M. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

A. V. M. Subbaraju .. *Petitioner**

v.

A. Balanarasimhaiya and others .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), *sections* 12, 15—*Application under section* 15 *read with sections* 13 *and* 14 *for patta to the private lands of a landholder—Grant of—Requirements.*

Where an application under section 15 of the Madras Estates (Abolition and Conversion into Ryotwari) Act read with sections 13 and 14 of the said Act, for the grant of a ryotwari patta to the private lands of a landholder is made, it cannot be rejected merely on the ground that the lands in question were being leased out to ryots ever since their purchase and that there was no evidence of personal cultivation by the landholder or by his predecessors-in-title at any time. Personal cultivation by landholder is only one of the requirements of proof in such cases which have been laid down under section 12 of the Act, namely, the requirement stated in section 12 (*b*). But even without such evidence of personal cultivation, if the landholder makes out the ingredients required under section 12 (*a*) of the Act read with section 3 (10) (*b*) of the Estates Land Act, it would be sufficient for discharging the onus of proof.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the proceedings of the Estates Abolition Tribunal, Chingleput (District Judge, Chingleput) in E.A.T.A.S. No. 2 of 1962, to quash the Judgment and Decree dated the 31st July, 1964 in the said E.A.T.A.S. No. 2 of 1962.

K. Parasaran, for Petitioner.

N.M. Manivarma, for Respondents Nos. 1, 3, 4 to 6 and for *T. Thirumaran,* for Respondents Nos. 7 to 9 and for *M. Krishnaswamy,* for Respondents Nos. 10 to 15.

J. Kanakaraj for the Government Pleader, for Second Respondent.

The Court made the following

ORDER.—This writ petition is filed under Article 226 of the Constitution by one A. V. M. Subbaraju, son of Mallikarjunayya. Mallikarjunayya filed E.A.T.A.S. No. 2 of 1962 before the Estate Abolition Tribunal, Chingleput, against the order of the Additional Assistant Settlement Officer, Chittoor, in S.R. No. 361/UT/56, an application under section 15 of the Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948) read with sections 13 and 14 of the said Act, for the grant of a ryotwari patta to the private lands of the landholder, in the under-tenure estate of Chengalvapura Agraharam, Village of Triuttani Taluk. The Assistant Settlement Officer rejected the application on the main ground stated from his order, namely that the landholder's own evidence in the case showed that the lands were being leased out to ryots ever since their purchase and that there was no

*W.P. No. 1925 of 1964. 26th July, 1967.

personal cultivation by the landholder or by his predecessors-in-title at any time. Against the above order, an appeal was filed by Mallikarjunayya, who was one of the landholders owning a share in the landholders' rights in the under-tenure village. Mallikarjunayya died during the pendency of the appeal before the Tribunal, and his son Subbaraju, the present petitioner, was impleaded as his legal representative. The Tribunal in its judgment has made reference only to the counter filed by two objectors, namely, Balanarasimhiah and Chokkalinga Reddy. Balanarasimhaiah claimed two items under a patta granted to him by the Estates Abolition Tribunal, Chittoor on 30th October, 1957. Chokkalinga Reddy claimed to have purchased items 3 and 4 in Court auction in execution of a decree of the District Munsif's Court of Sholinghur. It is urged before me by the learned Counsel Sri Manivarma for the respondents in this writ petition, that the other objectors also filed counters before the Tribunal, but the Tribunal has made only a note that none of the objectors appeared before the Assistant Settlement Officer to contest the claim of the landholder. The Tribunal, however, referred to the ground which the Assistant Settlement Officer himself had relied upon, namely, the absence of evidence regarding personal cultivation by the landholder, and the fact that he appeared to have been leasing out the lands to ryots on *waram* rent basis. The Tribunal also relied on the fact that the documents of sale produced by the landholder, Exhibits A-1 to A-3, containing a description of the lands, did not properly tally with the items in dispute in the appeal, and the necessary correlative statement supplied to him also did not clear up the difficulties sufficiently. These observations show that the Tribunal was of the opinion that in the absence of evidence regarding personal cultivation by the landholder and in the absence of proper correlation he has failed to discharge the onus laid upon him to prove that the lands were private lands. But it is urged by the learned Counsel Sri Parasaran appearing for the petitioner herein, who was the appellant before the Tribunal, that the stress laid on the aspect of personal cultivation by the landholder takes into account only one of the requirements of proof in such cases which have been laid down under section 12 of the Estates (Abolition and Conversion into Ryotwari) Act, XXVI of 1948, namely, the requirements stated in section 12 (*b*), but even without such evidence of personal cultivation, if the landholder makes out the ingredients required under section 12 (*a*) of the Act read with section 3 (10) (*b*) of the Estates Land Act, it would be sufficient for discharging the onus of proof. This aspect of the matter has been referred to in an unreported judgment of this Court by Anantanarayanan, J., (as he then was), where the learned Judge observed in *S. M. K. P. Peer Masthan Rowther* v. *Chinnaiah Kone and others*[1] :

> "On the contrary, the landholder really seems to have claimed that these lands were his pannai or private lands, within the meaning of section 12 (*a*) of the Act alone. Section 12 (*a*) takes us to the definition of private land in section 3 (10) (*b*) of Madras Estates Land Act (I of 1908). Even in section 3 (10) (*b*) there are several sub-clauses of which sub-clause (i) is alone relevant, namely, 'the domain or home-farm land of the landholder, by whatever designation known, such as Kambattam, khas, sir or pannai.' For this definition to apply, it is not necessary that the lands should have been actually cultivated at any time. It is sufficient that they are cultivable lands, and that they are within the cowle grant of the under-tenure village."

If this principle had been borne in mind, the main emphasis laid by the Assistant Settlement Officer on the aspect of personal cultivation and the emphasis which is also found laid on the same aspect by the Tribunal, would not have been there. On the other hand the aforesaid Tribunals should have also directed themselves to the question whether the requirements of section 12 (*a*) read with section 3 (10) (*b*) of the Estates Land Act have been satisfied in this case. Incidentally, it was argued by the learned Counsel for the petitioner, that Balanarasimhaiya who claims to have obtained a patta from the Estates Abolition Tribunal, Chittoor, possibly might have

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1. W.P. No. 41 of 1959.

obtained patta on the footing that he was a landholder, because, if patta has to be obtained for ryotwari lands, it must be obtained under section 11 from the Settlement Officer and not from the Tribunal. But it is equally possible that in appeal by the landholder before the Estates Abolition Tribunal, Balanarasimhaiya might have appeared as a respondent and succeeded in proving his claim that the land was ryoti and the question of grant of patta to him might have arisen as an incidental matter, but what actually happened in this connection again requires clarification with reference to the order of the Estates Abolition Tribunal, Chittoor, on 30th October, 1957.But, if, for any reason, Balanarasimhaiya got patta from the Tribunal on the footing that it was landholders' private land, it might be a ground which would have relevancy in connection with the claim of the petitioner in this case. The learned Counsel for the petitioner also urges that before the Settlement Officer who actually recorded evidence, the land-holder gave oral evidence regarding the continuous treatment of the land at all material times as his private land, and the utter absence of any evidence on the part of the objectors showing the exchange of patta and muchilika and also the absence of any evidence of transactions in respect of the lands by the objectors, like sales, mortgages and so on during a long period of time. These facts will have their place, if the matter is considered by the lower Tribunals of fact in their proper perspective and, as mentioned already, omitting the special emphasis laid upon the requirement of section 12 (*b*) of the Act when, in a case like the present, the landholder appears to have attached greater importance to the requirement of section 12 (*a*). For the aforesaid reasons I am of the opinion that the order of the Tribunal requires reconsideration.

The learned Counsel appearing for the respondents-objectors requested that, in the event of a remand, an opportunity might be given to the respondents to appear and present their objections before the lower Tribunal and, the Tribunal may also consider the question of taking additional evidence if such evidence is required for a proper disposal of the question at issue. This request appears to be reasonable and it is allowed. The writ petiton is allowed, the order of the Tribunal is set aside and the matter is remitted to the Tribunal for fresh disposal in the light of the observations mentioned above.

No order as to costs.

V.K. *Petition allowed; matter remitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

Sambamurthy Gurukkal .. *Petitioner**

v.

The State of Madras, represented by the Secretary to the Hindu Religious and Charitable Endowments, Madras (Revenue Department), and others .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XXII of 1959), section 118—Scheme framed by the former Board—Clause empowering Board to appoint an Executive Officer to temple—Appointment under the clause by the Deputy Commissioner—Not valid —Power of Board to be exercised by the Commissioner after the 1959 Act—Notice to hereditary trustee before such appointment by Commissioner—Small temple with meagre income—Question of appointment of an Executive Officer—Matter for consideration by the Commissioner—Section 45, not applicable.

A clause in a scheme framed by the former Madras Hindu Religious Endowments Board as modified in a suit filed in the Civil Court, empowered the Board to appoint an Executive Officer for the temple. Relying on this provision, the

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* W.P. No. 2032 of 1964. 9th August, 1967.

Deputy Commissioner in 1962, appointed an Executive Officer. The petitioner, a hereditary trustee of the temple filed a revision petition to the Commissioner and the State Government against such appointment but without success. In a writ petition filed by the petitioner to quash the orders,

Held a writ will issue quashing the appointment of the Executive Officer.

The Board as constituted under the earlier enactments ceased to exist with the enactment of the Madras Act of 1951. Section 102 of the Act of 1951 states any reference to the Board in the previous Acts, shall, on and from the commencement of the Act, be construed as reference to the Commissioner appointed under the 1951 Act. The Act of 1959 maintains this continuity in regard to the Commissioner exercising the powers which the Board exercised under the Acts prior to 1951. Therefore the power which the particular clause conferred on the Board for the appointment of an Executive Officer, could be exercised only by the Commissioner and not by the Deputy Commissioner.

As the appointment was purported to have been made only under the clause in the scheme, it is unnecessary to refer to the interpretation of section 45 of the Act, as laid down by decisions.

In any such appointment to be made by the Commissioner, having regard to the fact that the hereditary trustee was in management for a number of years without any complaint, it would be reasonable to give him an opportunity to make any representation in that respect before an appointment is made. The Commissioner may also take into consideration whether at all an appointment of an Executive Officer is necessary in view of the fact that the temple is a small one with a meagre income.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the proceedings of the Deputy Commissioner for Hindu Religious and Charitable Endowments (Administration), Thanjavur in R.C. No. 6739-A-3, dated 17th May, 1962, appointing an Executive Officer for Sri Purathanavaneswarar Temple, Thiruchitrambalam, Pattukottai Taluk, as confirmed by the State of Madras in Memo. No. 104701/P1/63-11, dated 21st May, 1964 and quash the same.

V. Krishnan, for Petitioner.

J. Kandakaraj for the Government Pleader, for Respondents.

The Court made the following

ORDER.—Since the matter in controversy in this writ petition can be disposed of on a preliminary ground regarding jurisdiction, it is sufficient to state briefly such facts as are necessary for that purpose. The petitioner is the hereditary trustee of Sri Purathanavaneswarar Temple, Thiruchitrambalam, Pattukottai Taluk, Tanjore District. It is common ground that a scheme framed by the former Madras Hindu Religious Endowments Board, as modified in O.S. No. 38 of 1940 on the file of the District Court, West Tanjore, continues to be applicable to the affairs of the temple. That scheme contains a clause, which is to the following effect:

> "The Board shall have power to appoint an Executive Officer for the temple. His salary shall come out of the funds of the temple. The salary and scale of his salary and the conditions of his service shall be governed by the provisions of Board's Order No. 2001, dated 20th July, 1942, as modified from time to time."

Relying on this provision, on 18th September, 1962, the Deputy Commissioner, Hindu Religious and Charitable Endowments (Administration) Department, Thanjavur, appointed one Kandaswami as the Executive Officer of the temple. The petitioner filed a revision petition aggrieved against that order to the Commis-

sioner who rejected the petition by an order dated 2nd August, 1963. A subsequent revision to the State Government was also dismissed. The petitioner has, thereafter, come to this Court by filing this writ petition and seeks for a writ of *certiorari* quashing the orders mentioned above.

It is urged by the learned Counsel for the petitioner that the appointment of an Executive Officer substantially diminishes his powers to manage the temple, and that such an appointment ought not to have been made in this case, without prior notice to the hereditary trustee, when no specific allegations had been made that he had mismanaged the affairs of the temple and that the interests of the temple required the appointment of an Executive Officer. As against this contention, the learned Government Pleader appearing for the respondents urges that clause 6 of the scheme above extracted gives the necessary power for the appointment of an Executive Officer, that the trustee is bound by the provisions of the scheme, and that therefore he cannot insist upon, prior notice before an Executive Officer is appointed. Learned Counsel for the petitioner refers to certain observations of the Supreme Court in the decision in *S. D.G. Pandarasannadhi* v. *Madras State*[1]. The Supreme Court observed, with reference to certain powers conferred on the Executive Officer to be appointed under a proposed modification of a pre-existing scheme and which was dealt with in that decision :

> "Such a drastic provision may be necessary in a case where the temple is mismanaged, or if there are other circumstances which compel such an appointment. But there is concurrent finding of fact in this case that the Commissioner has failed to establish any of the charges levelled by him against the trustee. It is not, therefore, possible to hold that any case has been made out for the appointment of an Executive Officer who practically displaced the trustee."

The learned Government Pleader submits that the above decision will apply only where for the first time there are proposals undertaken to appoint an Executive Officer and to that extent the powers of the trustee are sought to be affected, but not to a case like the present, where the matter has already been considered and a scheme passed and accepted which contains the necessary power to appoint an Executive Officer, and, in such circumstances, there will be no need before the power is exercised to give notice to the hereditary trustee, or to establish that he had been guilty of mismanagement of the affairs of the temple. The learned Government Pleader refers also to two unreported decisions of this Court one in (*S. Nataraja Pillai* v. *The Commissioner, Hindu Religious and Charitable Endowments, Madras*[2] by Srinivasan, J., which was followed by Ramamurti, J., in *Sri Abhyapradanavaradarajaswami Temple, Kambarajapuram, Kancheepuram Taluk* v. *The Commissioner, Hindu Religious and Charitable Endowments (Administration), Madras*[3]. What the learned Judges have laid down in the above decisions, is that when the Commissioner for Hindu Religious and Charitable Endowments Department proceeds to appoint an Executive Officer under section 45 of the Madras Hindu Religious and Charitable Endowments Act, 1959, he is competent to do so without any reference to the trustee and that it could not be contended that before such appointment of an Executive Officer, the trustee should be given notice.

But it has to be borne in mind that in the present case, the Executive Officer was not appointed under section 45 of the aforesaid Act. When it was urged before the Commissioner in the revision petition filed before him by the petitioner herein, that it was the Commissioner who was empowered to appoint an Executive Officer and not the Deputy Commissioner, the Commissioner met the objection by observing that in the present case the appointment was made by the Deputy Commissioner

1. (1966) 2 S.C.J. 81 : (1966) 2 M.L.J. (S.C.) 1 : (1966) 2 An.W.R. (S.C.) 1 : (1965) 2 S.C.R. 934 : A.I.R. 1965 S.C. 1683 at 1687.
2. W.P. No. 880 of 1960.
3. W.P. No. 547 of 1962.

in pursuance of clause 6 *of the scheme* and, therefore, the objection that he had no power to make such appointment under section 45 of the Act would not hold good. So it is clear that the respondents have treated the appointment of the Executive Officer in this case as one made in pursuance of clause 6 of the scheme aforesaid. Consequently, it is unnecessary to apply to the interpretation to section 45 of the Act given by the learned Judges in the two writ petitions stated above.

What remains therefore is to examine whether the present appointment by the Deputy Commissioner is in compliance with clause 6 of the scheme. That clause gives power to the Hindu Religious and Charitable Endowments Board to make the appointment. The Board as constituted under the earlier enactments ceased to exist with the enactment of the Madras Act XIX of 1951. Section 102 of that Act states that any reference to the Board in any enactment in force in the State of Madras or in any notification, order, scheme, etc., made under any such enactment and in force in the State, shall, on and from the commencement of the Act, be construed as reference to the Commissioner appointed under the 1951 Act. The 1959 amended Act maintains this continuity in regard to the Commissioner exercising the powers which the Board exercised under the enactments prior to 1951. From this, it would be clear that the power which clause 6 of the scheme had conferred on the Board for appointing an Executive Officer, could be exercised only by the Commissioner, and not by the Deputy Commissioner. On this preliminary ground, the appointment in the present case cannot be sustained and has to be set aside. I, therefore, allow the writ petition and quash the appointment of the Executive Officer in this case by a writ of *certiorari*.

I have not given any decision on the other point raised as to whether a notice is necessary or not before the Commissioner exercises his power under clause 6 of the scheme to appoint an Executive Officer. But, considering the circumstance that for 13 years the hereditary trustee has been allowed to be in management without any complaint, it would be reasonable to give him an opportunity to make any representations in that respect before an appointment of Executive Officer is made. Further the temple itself is a very small one, its annual income being only Rs. 572, as appears from the petitioner's affidavit. The income may not be sufficient to meet the expenses of an Executive Officer appointed solely for the temple. In fact the temple had to be grouped with another temple and treated as one unit to be under the management of an Executive Officer appointed for both the temples. This circumstance also may have relevancy in considering the question whether it is really necessary to have the management by the hereditary trustee supplemented by the appointment of an Executive Officer in the interests of the temple. These points will have to be considered by the Commissioner.

The petition is allowed with the observations mentioned above. No order as to costs.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT:—MR. JUSTICE P. S. KAILASAM.

M/s. Kalyani Transports (P.) Ltd., Town Extension, First Street, Dharapuram Road, Tiruppur .. *Petitioner**

v.

The Regional Transport Authority, Coimbatore, and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), section 57 (2) and (3)—Suo motu application for permit—Procedure under section 57 (3) to be followed—Application returned with endorsement to apply when invited under section 57 (2)—Return not according to law—Regional Transport Authority inviting applications fixing last date for applications—Re-presentation of returned application—Proper course to dispose of all applications together.

When a *suo motu* application or an application in response to the notification of the Regional Transport Authority is made, then the procedure under section 57 (3) of the Act will have to be followed. Instead of notifying the applications made by the petitioner, the Regional Transport Authority returned them informing the petitioner that he may apply when applications are invited under section 57 (2) of the Act. This return is not according to law, for on receipt of the application the procedure prescribed under section 57 (3) should have been followed. Neither the Act nor the rules prescribe any time for representation of the applications returned and therefore when the petitioner re-presented his application, they were pending before the Regional Transport Authority. Though the petitioner is not entitled to press his claim as an applicant who applied in response to the notification of the Regional Transport Authority, as his applications filed *suo motu* were pending, it is only proper that his applications should also be considered along with the applications received by the Regional Transport Authority in response to his notification.

Petition praying under Article 226 of Constitution of India that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the Regional Transport Authority, Coimbatore, to notify the application of the petitioner dated 29th November, 1965 on the route Tiruppur to Coimbatore *via* Avanashi and Karumathampatti and returned by the authority for representation and re-presented on 19th August, 1966 and dispose of the application along with the other applications received in pursuance of the notification in R. No. 38817/A-3/66, dated 18th May, 1966, for the grant of permit on the route above-mentioned, etc.

G. Ramaswami, for Petitioner.

T. Selvaraj for the Government Pleader, for State.

V. Krishna Menon, for 3rd Respondent.

The Court made the following

ORDER.—These two writ petitions are filed for the issue of writs of *mandamus* directing the Regional Transport Authority, Coimbatore, to notify the applications of the petitioner dated 29th November, 1965 for the grant of permits on the routes: (1) Tiruppur to Coimbatore *via* Avanashi and Karumathampatti, and (2) Tiruppur to Erode *via* Perumanallur, and which were returned by the Authority for representation and were re-presented on 19th August, 1966 and to dispose of the said applications along with the other applications received in pursuance of the notification of the Regional Transport Authority for the grant of permits on the said routes. The petitioner *suo motu* applied for permits for the routes abovementioned by his application dated 29th November, 1965. The Regional Transport Authority returned the petitioner's applications with the endorsement that he may apply as and when applications are invited under section 57 (2) of the Motor Vehicles Act. This endorsement was dated 16th December, 1965. Subsequently the Regional

* W.Ps. Nos. 2303 and 2304 of 1966. 18th September, 1967.

Transport Authority invited applications for grants of permits on the above two routes under section 57 (2) of the Act and the last date for the receipt of such applications was fixed as 16th June, 1966. The petitioner applied only on 17th June, 1966 after the expiry of the time fixed. It is unnecessary to go into the question of this delay in these petitions. The petitioner on 19th August, 1966 filed a petition before the Regional Transport Authority explaining that he had applied on 29th November, 1965 for permits on these two routes and that his applications are pending, as he had represented those applications which were returned to him on 16th December, 1965. He therefore prayed that his application dated 29th November, 1965 may be notified and considered along with other applications received in pursuance of the notification of the Regional Transport Authority under section 57 (2) of the Act. The Regional Transport Authority declined to entertain the petitioner's application and dismissed the same. The petitioner preferred appeals to the State Transport Appellate Tribunal but that Tribunal dismissed the said appeals on the ground that they were not maintainable since there was no rejection of the applications of the petitioner by the proceedings of the Secretary, Regional Transport Authority, Coimbatore. Hence these writ petitions.

Under section 57 (2) of the Act, a person may apply for a stage carriage permit not less than six weeks before the date on which he desires that the permit shall take effect. The sub-section also provides that the Regional Transport Authority may also appoint a date for receipt of such applications. When a *suo motu* application, or an application in response to the notification of the Regional Transport Authority, is made, then the procedure under section 57 (3) of the Act will have to be followed. The Regional Transport Authority is bound to make the applications available for inspection at the office of the Authority and publish the applications or the substance thereof in the prescribed manner with a notice of the date before which representations in connection therewith may be submitted and the date on which and the time and place at which the applications and any representations received will be considered. After the receipt of such representations the Authority will have to proceed as provided for in the section. Instead of notifying the two applications made by the petitioner on 29th November, 1965, the Regional Transport Authority returned them informing the petitioner that he may apply when applications are invited under section 57 (2) of the Act. This return is not according to law, for on receipt of the applications the procedure prescribed under section 57 (3) should have been followed. Neither the Act nor the Rules prescribe any time for representation of the applications returned and therefore when the petitioner re-presented his application on 17th June, 1966, they were pending before the Regional Transport Authority. It is true that the petitioner did not apply in response to the notification of the Regional Transport Authority within the time prescribed for receipt of such applications. He is therefore not entitled to press his claim as an applicant who applied in response to the notification of the Regional Transport Authority. But his earlier applications filed *suo motu* on 29th November, 1965 are not yet disposed of and they are pending before the Regional Transport Authority. If the other applications received in response to the notification by the Regional Transport Authority are disposed of without taking into consideration the two pending applications of the petitioner, the petitioner will be prejudiced. Therefore, in the circumstances, it is only proper that the two applications of the petitioner should also be considered along with the applications received by the Regional Transport Authority in response to his notification. The Regional Transport Authority, Coimbatore, will notify the two applications of the petitioner according to section 57 (3) of the Act and then take up the petitioner's application as well as the other applications received by him in response to his notification and dispose of all the applications together.

The writ petitions are allowed. There will be no order as to costs.

S.V.J. — *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T. RAMAPRASADA RAO.

Muthiah Nattar .. *Petitioner**

v.

N. S. Ibrahim Rowther alias N. S. Mohammed Ibrahim and another .. *Respondents.*

Madras Cultivating Tenants Protection Act (XXV of 1955), section 4 (5) and rule 8 (ii) (e) of the Madras Cultivating Tenants Protection Rules—Civil Procedure Code made applicable "as far as possible" to the proceedings of the Rent Court—Provision for addition of parties in the Rules—Tenant impleading third party in possession beyond the period of limitation-Tenant knowing of alienation to the third party itself after the period of limitation—Application of law to the facts of the case—Order 1, rule 10, read with sections 22 and 29 of the Limitation Act or the Rule to apply—Addition of the parties not be barred by rule of limitation—Previous decision of the High Court to add the third party will continue—Right of third party being derivative is defeasible on eviction of landlord.

Rule 8 of the Madras Cultivating Tenants Protection Rules provides that every Court constituted under the Madras Cultivating Tenants Protection Act shall have the powers exercisable by a civil Court in the trial of suits and in particular provides, under rule 8 (*ii*), that the proceedings before the Rent Court shall, "as far as possible ", be governed by the provisions of the Code of Civil Procedure, 1908. Rule 8 (*ii*) (*e*) of the Rules provided for the addition of parties to the proceeding.

The instant case, the tenant had no opportunity of knowing that there was an alienation or dealing of the land in question by the landlord in favour of the third party. The first disclosure of such an event was beyond the period of two months, when the landlord filed the counter-affidavit. Should the provisions of Order 1, rule 10 of Civil Procedure Code, read with sections 22 and 29 of the Limitation Act be strictly made applicable to the proceedings under the Madras Cultivating Tenants Protection Act ?

Due effect should be given to the parenthesis " as far as possible ". But addition of parties beyond time, even if it is prescribed by a special enactment, would not be barred by the rule of limitation as such and such proceedings ought not to be dismissed *in limine* as against the party so impleaded or added.

Kesavalu v. *Rajaram*, (1920) 38 M.L.J. 29, followed.

Therefore, the fact that the petition was filed beyond a period of two months from the date of dispossession as against the third party who has been inducted into possession by an arrangement *inter se* between the landlord and such third party, cannot be seriously pressed by the third party so as to non-suit the petitioner.

Even otherwise, if the right of the third party who is in possession is a derivative right essentially defeasible and solely depending upon the right of the landlord from whom he obtained possession and if the ground of eviction is sufficient to annul the right of the landlord, it cannot be said that the third party in possession should be made a party to the proceeding.

Further, the third party having been held to have been properly impleaded according to decision of the High Court, has to continue as a necessary and proper party to these proceedings and the rule of limitation as such does not strictly apply to the facts and circumstances of the case arising under section 4 (5) of the Madras Cultivating Tenants Protection Act.

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*C.R.P. No. 563 of 1965. 20th January, 1967.

Petition under section 6-B of Madras Act XXV of 1966 as amended by Act XIV of 1956 and section 115 of Act V of 1908 praying the High Court to revise the order of the Revenue Court of Kumbakonam dated 24th March, 1965 and made in P. No. 1678 of 1962.

M. R. Narayanaswami, for Petitioner.

K. Raman, for 1st Respondent.

G. Jagadisa Iyer, for 2nd Respondent.

The Court made the following

ORDER.—The third party who was sought to be impleaded by the petitioner-tenant, hereinafter referred to as the tenant, in the Revenue Court is the petitioner in this Court. He will be referred to in this judgment as the third party. The tenant's original application was for restoration of certain lands of which he alleged he was forcibly dispossessed from by the then only respondent, hereinafter referred to as the landlord. The tenant's application for such restoration was under section 4 (5) of the Madras Cultivating Tenants Protection Act, 1955. This application was filed on 17th July, 1962, on the ground that he was wrongfully dispossessed from such lands on 14th July, 1962. Under section 4 (5), a petition for restoration has to be filed within two months from the date of dispossession. To this application, the landlord filed a counter on September 19, 1962, which by itself was beyond two months from the date of dispossession, *inter alia* alleging that the tenant voluntarily surrendered the lands in question in March, 1962, and that on April, 1962, he entered into an agreement of sale of the lands with the third party and that the third party was ever since in possession of the lands. Apparently the tenant was not aware of the dealings *inter se* between the landlord and the third party until 19th September, 1962 when the counter was filed. On 3rd October, 1962, the tenant filed an application under rule 8 (*ii*) (*e*) of the Madras Cultivating Tenants Protection Rules, 1955, to add the third party, as a party to the proceeding. The third party, however, did not receive any notice of this application. The landlord in his counter-statement to this application for impleading the third party, *inter alia* contended that the application to add a party is barred by limitation as it was filed beyond two months from the date of dispossession. On August 28, 1963, the Rent Court directed the impleading of the third party as a party to the proceeding and this order was upheld by Venkatadri, J., in C.R.P. No. 272 of 1964. It does not however appear that the question of limitation which was raised by the landlord was ever argued or pressed into service during the hearing of the above proceedings.

The third party apparently was served with the amended application for restoration under section 4 (5) sometime after October 23, 1963, when the Rent Court passed the order to add him as a party. To this the third party independently filed a counter and amongst other things, he incidentally raised the contention that the application in so far as it was laid against him was barred by limitation and that no relief could be granted against him on this ground alone. On a request made by the third party by an independent application filed by him on 7th November, 1963, to decide this question as to limitation as a preliminary issue, the Revenue Court took up this point for determination and held against the third party. The present Civil Revision Petition is against the order of the Revenue Court.

Sri M. R. Narayanaswami, learned Counsel appearing for the third party, contends that the petition to implead the petitioner in this Civil Revision Petition having been accreditedly made under Order 1, rule 10 of the Code of Civil Procedure, the application is barred under section 22 read with section 29 of the Limitation Act (the provisions of the old Limitation Act applies to the present case). Sri K. Raman, learned Counsel appearing for the tenant, however, contended *contra* and submitted that this question of limitation was decided in the earlier proceedings and that the petition in any event is not barred by limitation, and even otherwise it is not necessary that third party should be a party to the proceeding at all, having regard to the

fact that the original application for restitution was filed in time and that by itself is a competent application in the eye of law.

The Madras Cultivating Tenants Protection Act being a special Act, affords relief to tenants under particular stated circumstances, and therefore ought to be strictly construed. Rule 8 of the Madras Cultivating Tenants Protection Rules, ordains that every Court constituted under the Madras Cultivating Tenants Protection Act shall have the powers exercisable by a civil Court in the trial of suits and in particular provides, under rule 8 (ii), that the proceedings before the Rent Court shall, "as far as possible", be governed by the provisions of the Code of Civil Procedure, 1908. We are here concerned with the addition of parties expressly provided for in rule 8 *(ii)* *(e)* of the Madras Cultivating Tenants Protection Rules. It is common ground that unless there is anything in the Madras Cultivating Tenants Protection Act or the rules prohibiting the application of any provisions of the Code of Civil Procedure, the Code is applicable to the proceedings in the Revenue Court. No doubt, the provisions of the Code of Civil Procedure, ought not to be strictly iron-jacketed and rendered inelastic. As the Code is mainly concerned with procedural law, intended to facilitate justice, its application has to be sought instead of being avoided, if it is so required in the interests of justice—*Sangram Singh* v. *Election Tribunal*[1]. But if a special local law provides a procedure which is defined, distinct and separate and is in conflict with the common law provision as envisaged under the provisions of the Code of Civil Procedure, then of course, the former will prevail. *Generalia specialibus non derogant* is an accepted principle of law. A proceeding before a Rent Court though not strictly a suit is certainly a legal proceeding wherein valuable justiciable rights of parties are adjudicated upon. Therefore it has to be considered whether the impact of the Code of Civil Procedure. as against the provisions of the special beneficial legislation of the Madras Cultivating Tenants Protection Act is so great and telling that the Code should prevail over the special provisions under the Madras Cultivating Tenants Protection Act.

It is significant to note that rule 8 *(ii)* of the Madras Cultivating Tenants Protection Rules makes the provisions of the Code as far as possible applicable. The question, therefore, in the instant case is whether Order 1, rule 10, read with sections 22 and 29 of the Limitation Act should be strictly made applicable to the proceedings under the Madras Cultivating Tenants Protection Act. No doubt, one of the canons of interpretation is that however hard may be the consequences, it cannot be held and Courts are not prompted to listen to arguments regarding hardship to by-pass the specific intendment and effect of a statutory provision.

I have already stated that the provisions of the Code of Civil Procedure, are made applicable to the proceedings before a Rent Court only "as far as possible". Due effect should be given to this parenthesis "as far as possible". Instances have arisen in this Court as to when and how a suit or proceeding against a third party impleaded after institution of the main suit should be considered to be barred *vis-a-vis* the third party. The earliest case is that reported in *Thekkian Rangacharlu Chettiar* v. *Muthukarnapan Kothan.*[2] This was a suit in ejectment against '*A*' (1st defendant in the suit) wherein '*B*' (3rd defendant in the suit) was added as a party to the suit on the allegations made by '*A*' that '*B*' was the usufructuary mortgagee of the property. When '*B*' was sought to be added as a party, more than 12 years had elapsed since the dispossession of plaintiff by '*A*'. Their Lordships, while holding that the plaintiff's suit was barred against '*B*' and that the plaintiff was entitled to a decree for possession against '*A*', observed as follows :

> "We have considered it desirable to adopt this course, for, otherwise, if we dismiss the suit altogether, the first defendant would be able to plead limitation in any subsequent suit by the plaintiff apart from any question of *res judicata*. The

1. (1955) S.C.J. 431 : (1955) 2 M.L.J. S.C. 13 : A.I.R. 1955 S.C. 425.
2. (1912) 16 I.C. 420.

3rd defendant being only a mortgagee under the first defendant, he could acquire only a mortgage right by prescription. The plaintiff obtaining possession against the first defendant would hereafter be entitled to sue the third defendant for redemption."

Obviously the learned Judges were constrained to hold that the suit was barred as against the 3rd defendant because the plaintiff could obtain a relief against him for redemption even after the passing of the decree in the form suggested by them. In *Kesavalu* v *Rajaram*[1] another Division Bench of this Court held that in a suit for specific performance of a contract of sale of a house, a subsequent purchaser of the house with notice of such contract having been joined as a defendant more than three years from the date fixed for the perfomance of the contract, the suit was not barred by limitation and the suit in its entirety ought not to be dismissed, as the subsequent purchaser was not the person who was primarily the party to perform the contract and was joined in order that the plaintiff might have full reliefs and might not be driven to a separate suit against him. In fact, the *ratio decidendi* in this suit is to a very great extent reiterated by the Supreme Court in *Durga Prasad* v. *Deepchand*[2]. Their Lordships under similar circumstances held that the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title to the plaintiff. I have referred to this decision at this stage only to support the view that even though a party is sought to be impleaded after the lapse of the period of limitation prescribed for a suit as against him, yet he would be retained as a party and the suit would not be dismissed as against him, but the Courts will be persuaded to hear him and afford appropriate relief to the plaintiff in such proceedings. In *Bhaskarunni Bangaru* alias *Venkataswamy* v. *Pallapothu Punnayya*[3], Jackson, J., was of course, of the contrary view. Even so, Veeraswami, J., in *Thangavelu Chettiar* v. *Kuppu Bai*[4], was of the view that in a suit for specific performance, if a subsequent alienee is added as a party, section 22 of the Limitation Act read with Order 1, rule 10 (2), Civil Procedure Code, applies and that the suit would clearly be barred in so far as the third party alienee was concerned. Apparently it appears to me that the Bench decision reported in *Kesavalu* v. *Rajaram*[1], was not cited or referred to either in *Bhaskarunni Bangaru* alias *Venkataswamy* v. *Pallapothu Punnayya*[3], or in *Thangavel Chettiar* v. *Kuppu Bai*[4]. Respectfully adopting the ratio and agreeing with the decision of the Division Bench in *Kesavalu* v. *Rajaram*[1], I am of the view that such addition of parties beyond time, even if it is prescribed by a special enactment, would not be barred by the rule of limitation as such and such proceedings ought not to be dismissed *in linine* as against the party so impleaded or added. On a careful consideration of the authorities cited above, I am of the opinion that though *prima facie* an application to add a party is preferred beyond the period of limitation , yet Courts are not helpless to pass the appropriate decree or afford appropriate relief to the party affected , namely, the plaintiff or petitioner in the suit or proceeding concerned. It is in the above perspective that the words "as far as possible" referred to above has to be effectuated. The third party cannot therefore successfully plead the bar of limitation.

This subject has been approached in a different angle, but with the same result by Ramamurti, J., in *Abdul Ravoof* v. *Kannappan*[5]. That was a case where the cultivating tenant filed a petition under section 4 (5) of the Madras Cultivating Tenants' Protection Act for restoration on the ground that he was forcibly dispossessed from the lands by the alleged subsequent lessee. The main contention therein was that the petition ought to have been dismissed once it is found that the lessors' had parted with possession in favour of third parties and that they had not been made parties to the proceedings for restoration. In a considered judgment the learned Judge made the following observations :

1. (1920) 38 M.L.J. 29 : A.I.R. 1920 Mad. 96.
2. (1954) S.C.J. 23 : (1954) 1 M.L.J. 60.
3. (1932) M.W.N. 330.
4. I.L.R. (1964) 2 Mad. 164 : (1964) 2 M.L.J. 138.
5. I.L.R. (1966) 1 Mad. 538.

"....this necessity for giving notice to the cultivating tenant who has been inducted into the land by the landlord subsequent to the dispossession of a prior tenant would not apply where the dispossession had taken place after the commencement of the Act....It will,therefore, be seen that consideration which apply to section 4 (1) read with section 4 (4) would not apply to a dispossession after the commencement of the Act governed by section 4 (5). The mere fact that a person is in possession of the property and the order for eviction, if enforced, or executed, would affect his rights is not a ground by itself to hold that he should be made a party without reference to the character of his right under the general law. If the right of the person who is in possession is a derivative right essentially defeasible and solely depending upon the right of some other person from whom he obtained possession and if the ground of eviction is sufficient to annul the right of that person, it cannot be said that every person in possession, regardless of all circumstances should be made parties to the proceeding...The question is not whether the subsequent lessee was or was not made a party to the proceeding but whether his righ also would not come to an end along with the extinguishment of his landlord's right to remain in possession. The crux of the matter lies in recognising the consequences of a defeasible or derivative title coming to an end by the operation of a superior right. Any other view would, in my opinion, completely frustrate and defeat the purpose of the special legislation, the Madras Cultivating Tenants' Protection Act."

Ramamurthi, J., in the above judgment expressed dissent to the view taken by Anantanarayanan, J., as he then was, in *Vellachamy Ambalam* v. *Paramaswamy Ambalam*[1]. The facts of the case reported in *Vellachamy Ambalam* v. *Paramaswamy Ambalam*[1], are entirely different. Even otherwise, it does not appear that the third party therein ever pressed the point of limitation. There was a direction by the learned Judge in that case that the party therein should not raise the plea of limitation. As to why such a direction was made is not clear ; presumbly the parties did not intend to press the point of limitation in that case.

In the instant case, the tenant had no opportunity of knowing that there was an alienation or dealing of the land in question by the landlord in favour of the third party. The first dsclosure of such an event was beyond the period of two months, when the landlord filed the counter-affidavit on 19th September, 1962. Further, the fact that the petition was filed beyond a period of two months from the date of dispossession as against the third party who has been inducted into possession by an arrangement *inter se* between the landlord and such third party, cannot be seriously pressed by the third party so as to non-suit the petitioner. It was so held by the Bench of thisCourt in *Kesavalu* v. *Rajaram*[2], and even the Supreme Court impliedly, accepted such a principle,though presumably the question of limitation did not directly arisethere. In such cases it is the duty of the Court, whose concept and ideal should be to maintain justice, equity and good conscience,to see that it should not by a mere application of the letter of the law, affect its spirit and intendment and fail to afford such necessary and adequate relief of the petitioner by dismissing the same as against the third party impleaded beyond time. As I am entirely in agreement with the reasoning of Ramamurti, J., that such a third party appears to be not even a necessary party to such proceeding, I am inclined to hold that the petitioner in this case ought not to be non-suited or his petition dismissed as against the third party merely on the ground that the petition has been filed beyond time. I find that rule 10 of the Madras Cultivating Tenants' Protection Rules has also been amended by adding the following sentence at the end of the existing rule:

"The provisions of rules 35 and 95 to 103 of Order 21 of the Code of Civil Procedure, 1908, shall as far as may be, apply to proceedings under this rule."

In fact, Ramamurti, J., in the above cited case, recomended the amendment of the Act by providing suitable machinery for the effective enforcement of the order

1. (1962) (1962) 2 M.L.J. 142. 2. (1920) 38 M.L.J. 29 : A.I.R. 1920 Mad. 96.

for eviction or order for possession on the lines similar to Order21, rules 35 and 95 to 103 of the Code of Civil Procedure. Apparently the Legislature has amended the rule on such observations made by this Court. Though the rule of law that a person who is not privy to a judgment is not bound by it is axiomatical, yet in the peculiar circumstances of the provisions of the special enactment such as the Madras Cultivating Tenancts' Protection Act, such a rigorous application of the rule would make it impossible for *bona fide* tenants to obtain appropriate relief in cases where the landlord inducts into possession others without the knowledge of the tenant and sometimes indeed to spite the tenant. As observed by Ramamurti, J., the third party who may be inducted into possession may be a mere agent or a mere licencee and that it would be impossible for the party agrieved to take note of rights of all persons that may be in apparent possession. Even such information of induction into such possession in the instant case was available to the tenant only after the lapse of the so called period of two months prescribed for in section 4 (5) of the Madras Cultivating Tenants' Protection Act.

I am therefore of the view that, considering the real intendment of the beneficial legislation such as the Madras Cultivating Tenants' Protection Act, the tenant in this case cannot be non-suited even though this application to implead the third party was filed beyond the period. Thus Order 1, rule10, Civil Procedure Code and sentions 22 and 29 of the Limitation Act being statutorily made applicable only as far as possible, the line has to be carefully drawn in the appropriate cases. This is a case in which a strict and literal application of the above common law provisions as to limitation would do injustice rather than justice which should not only be done, but seem to be done. Further, the third party having been held to have been properly impleaded by Venkatadri, J., in C.R.P. No. 272 of 1964 has to continue as a necessary and proper party to these proceedings and the rule of limitation as such does not strictly apply to the facts and circumstances of this case arising under section 4 (5) of the Madras Cultivating Tenants' Protection Act. Of course, all the parties are entitled to plead and place their respective factual contentions before the Revenue Court. With these observations the Civil Revision Petition is dismissed. There will, however, be no order as to costs.

V.M.K. *Civil Revision Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. VENKATARAMAN.

T. V. Sivaraj *alias* T. V. Sivaraj Rahiman Bakish Pakkiri Sahib and another .. *Appellants**

v.

M. Sadasiva Idangapirander *alias* M. Sadasivam Pillai .. *Respondent.*

Madras Civil Courts Act (III of 1873) *as amended by Madras Act (XVII of* 1959), *section* 30—*Subordinate Judge, not being a Vacation Judge disposing of matter properly pending before. him during vaction—No objection by the parties—Whether void.*

Civil Procedure Code (*V of* 1908), *Order* 40, *rule* 1—*Appointment of Receiver—Question of title—Whether material.*

The contention that during the summer recess the Vacation Judge was the only Judge who had jurisdiction and the regular subordinate Judge had no jurisdiction to pass the order, is untenable. The provision vesting jurisdiction in the Vacation Civil Judge is not intended to take away the jurisdiction which previously the Subordinate Judge had, to dispose of a matter which was properly pending before

*A. A. O. No. 139 of 1967. 13th July, 1967.

him if he was inclined to work during the vacation and if the parties raised no objection thereto, which is precisely the case here.

It may not be correct to say that the question of title is immaterial ; because the decisions generally say that the plaintiff seeking appointment of receiver to oust the defendant in possession must *prima facie* show some title.

On the facts it was held that, though the first defendant who is in possession has some *prima facie* title, in view of some disturbing features, it is not a case where the first defendant can urge that his possession should not be disturbed.

Appeal against the Order of the Court of the Subordinate Judge, Kumbakonam dated 19th April, 1967 and made in I.A. No. 109 of 1967 in O.S. No. 15 of 1967.

R. Gopalaswamy Iyengar and *K. N. Balasubramaniam*, for Appellants.

V. Vedantachari, for Respondent.

The Court made the following

ORDER.—This Civil Miscellaneous Appeal has been filed by the contesting defendants 1 and 2 in O.S. No. 15 of 1967 on the file of the Subordinate Judge of Kumbakonam, against the order of the learned Judge appointing a Receiver of the properties of which the defendants claim to be in possession.

The dispute between the parties is over the right of succession to the office of Makkandhar or the Manager of the Thaikkal concerned in the suit. The Thaikkal was founded over a century back by a Hindu who came under the benign influence of a Muslim saint. He endowed some properties for the Thaikkal.The Makkandhar, by birth a Hindu had to embrace Islam before becoming Makkandhar. The last Makkandhar was one such person named Balasubramania Rahim Bakish Pakkir Sahib. He died on 23rd February, 1967. The first defendant claimed to be the lawful successor on the ground of a nomination by the last Makkandhar in a registered will dated 13th December, 1964 (Exhibit B-1). The first defendant is the sister's son of the last Makkandhar and also his son-in-law. The will recites that the first defendant was also adopted as son by the last Makkandhar. The first defendant further alleges that he embraced Islam and took possession of the Thaikkal and properties immediately.

The contention of the plaintiff Sadasiva Idangapirandhar is that the succession to the office is by election by the members of the Hindu family, that normally the seniormost male member is so elected and that in fact he was so elected in this case on 23rd February, 1967 itself by resolution Exhibit A-1. He alleges that the first defendant was able to forestall the plaintiff by getting into possession because of the help of some police officer who was related to the first defendant. The suit was filed on 1st March, 1967 itself and the plaintiff filed the application for the appointment of a Receiver.

The matter was keenly contested before the learned Subordinate Judge Sri G.S. Krishnamurthi. But the learned Judge felt it was undesirable to pronounce any opinion even tenatatively on the conflicting titles to the properties. He thought that there was a scramble for possession and that that would suffice for the appointment of a Receiver.

The first point taken by Sri R. Gopalaswami Ayyangar, learned Counsel for the appellants, is that the order was pronounced on 19th April, 1967 during the summer recess of the Subordinate Judge's Court and it is void under the provisions of section 30 of the Madras Civil Courts Act (III of 1873) as amended by Madras Act XVII of 1959. The amendment provides for the appointment of a Subordinate Judge to be designated as the Vcation Civil Judge for each District Court during the summer recess and he will have jurisdiction co-extensive with the jurisdiction of all the Courts in the district during the vacation. Section 30 (3) (*b*) which is relevant, runs thus :

"The jurisdiction of the Vacation Civil Judge shall extend to all suits, appeals and other proceedings pending in, or cognizable by, any civil Court (whether a District Court, a Subordinate Judge's Court or a District Munsif's Court) in the district concerned when such Court is adjourned for summer vacation."

The contention of Sri Gopalaswami Ayyangar is that during the vacation, it is only the Vacation Civil Judge who will have jurisdiction and that Sri G.S. Krishnamurthi not being a Vacation Civil Judge had no jurisdiction to pass the order in question. It is stated that the application for the appointment of Receiver was heard on 15th April, 1967, the last working day, that the learned Judge said that he was going to adjourn the application beyond the vacation unless the parties came to some agreement in the meantime and that they could report on 19th April, 1967, on which day he would be attending Court for pronouncing some other judgments, as to whether they had arrived at any agreement. On 19th April, 1967, however, when the parties reported that they failed to reach at any agreement, the learned Judge heard the parties and pronounced the order.

It seems to me that the contention that during the summer recess the Vacation Civil Judge was the only Judge who had jurisdiction and that the regular Subordinate Judge of Kumbakonam had no jurisdiction to pass the order, is untenable. The provision vesting jurisdiction in the Vacation Civil Judge is not, in my opinion, intended to take away the jurisdiction which previously the Subordinate Judge had, to dispose of a matter which was properly pending before him if he was inclined to work during the vacation and if the parties raised no objection thereto, which is precisely the case here. The decision in *Venkateso Ayyangar* v. *Kamalammal*[1] and *Ramdas Chakarbatti* v. *The Official Liquidator, Cotton Ginning Company Ltd., Cawnpore*[2] cited by Sri Vedantachari for the respondent plaintiff show that judgments pronounced on holidays are not void. The first point, therefore, fails. Further in view of the order I propose to make modifying the order of the learned Subordinate Judge, the point is academic and need not be pursued further.

On the merits of the order, it may not be quite correct to say, as the learned Subordinate Judge has done, that the question of title is immaterial ; because the decisions generally say that the plaintiff seeking appointment of a Receiver to oust the defendant in possession must *prima facie* show some good title. No doubt, the decision in *Ramsundar Dass* v. *Kamal Jha* Alias *Kamal Das*[3], cited by Sri Vedantachari states that it is undesirable to go into the question. But that was on the peculiar facts of the case. However, it is certainly true that what is said about the question of title for the disposal of the Receiver application should not prejudice the determination of the question at the regular trial.

Examining the question of title for the purpose of the Receiver application, it seems to me sufficient in this case to say that there is some *prima facie* evidence to show that in the past, succession was by nomination. A number of documents have been filed by the defendants to prove that and further there is an admission of the plaintiff to that effect before the Land Commissioner, Board of Revenue, under the Ceiling Act. The plaintiff has sought to explain away that admission ; but for our present purpose, it may *prima facie* be taken as admission. The point which I am emphasising is that here is a case where the first defendant who is in possession has some *prima facie* title. It may be that the title may turn out to be defective at the trial. If this were all, it may not be quite justifiable to oust him and appoint a Receiver. But there are some disturbing features, namely, that the first defendant has stated in his counter-affidavit and his rejoinder that the Thaikkal possesses not even a pie of cash and never possessed any cash or movebles. This is rather surprising when the plaintiff alleges that the Thaikkal has nearly 200 acres of wet and dry lands. The explanation of the first defendant-appellant's learned Counsel is that according to the defendants, the Thaikkal owns only about 23 acres of which 21 acres are dry and

1. (1912) 22 M.L.J. 212.
2. I.L.R. (1887) 9 All. 366.
3. (1905) I.L.R. 32 Cal. 741.

the rest of the properties are the private properties of the Makkamdhar though wholly subject to a charge (in favour of the Thaikkal and in favour of the Hindu sharers). The fact also remains that the last Mukkamdhar failed in the suit O.S. No.425 of 1963 on the file of the District Munsif of Kumbakonam which was filed by him for declaration that the properties mentioned in the plaint were not wakf properties. No doubt, the judgment is under appeal. But there is *prima facie* the finding of a Court against him. The first defendant is adopting the same stand now. Under these circumstances, it seems to me that it is not a case where the first defendant can urge that his possession should not be disturbed. Considering the facts and the circumstances of the case, it seems to me that it will be just and convenient to appoint more than one receiver on the following lines :

An Advocate-Receiver will be appointed as receiver of the properties in the possession of the tenants (about 110 acres). With regard to the pannai lands of 23 acres 55 cents which are now in the possession of the first defendant, the first defendant will be appointed as Receiver of the bulk of the lands of an extent of 16·97 acres and the plaintiff will be appointed as Receiver in respect of 6 acres and 58 cents. The details of the pannai lands have been furnished by Sri Sadagopan, learned Counsel for the appellants and they are not disputed before me. 6 acres and 58 cents of which the plaintiff will become Receiver are the following

Vadakkuppattam Village.

(1) An extent of 3 acres 66 cents out of 3 acres 91 cents in S. No. 135 (plaint item 107)

(2) An extent of 2 acres 45 cents out of 3 acres 45 cents in S. No. 136/1 (plaint item 108).

(3) An extent of 47 cents in S. No. 150/2 (plaint item 111).

The following will be the lands of which the first defendant will be the Receiver.

Pazhayar

S. No.	*Acres*	*Cents*
291	2	3
283–2	3	19
282–1	0	67
263–1	1	00
263–5	0	09
233–1	0	70
263–4	0	81
264–1	0	79
	9	28
Vadakkupattam		
110–2	0	06
116–4	0	01
131–1	1	72
131–3	0	78
132–1	0	73
133–2	0	50
134–1	2	97
117–3	0	92
	7	69
Total	16	97

Each of the parties, namely, the first defendant and the plaintiff will furnish security at the rate of Rs. 200 per acre in the Subordinate Judge's Court before becoming Receivers. They should furnish securities within 15 days from now.

Sri S. Kothandaraman was appointed Receiver. His name, however, has not been approved finally by the District Court for inclusion in the panel of Receivers. He does not, therefore, want to continue as Receiver. The two Receivers who are in the panel of Receivers are Sri Sambasiva Iyer and Sri Sundaresan, according to the statement of the learned Counsel Sri Sadagopan. Sri Sambasiva Iyer will be appointed as Receiver for 110 acres, and to be in charge of the management of the Thaikkal. He can continue Abdul Razack for doing the religious work in the Thaikkal. The Receiver need not take possession of the 46 acres which are in possession of the Hindu sharers.

It is made clear once again that what I have said, should not in any way prejudice the rights of either party on the questions which they may agitate at the trial of the suit, and the observations have been made purely tentatively in regard to the present application.

S.V.J. —— *Order modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

P.K. Ramaswamy .. *Petitioner**

v.

Municipality of Coimbatore, represented by its Commissioner, Coimbatore .. *Respondent.*

District Municipalities Act (V of 1920), *sections* 250 *and* 321 (11)—*Application for permission to instal machinery—Communication by Executive Officer that the application was receiving attention and that machinery not to be installed before obtaining permission—Not an order within the meaning of section* 250—*Application deemed to have been granted under section* 321 (11).

The reference to the words 'licence or permission in section 321 (11) shows that that section was intended to deal with cases of application for licence as well as application for permission and, therefore, section 250 is also included for the purpose of section 321 (11).

The communication by the Executive Officer of the Municipality to the petitioner that his application was receiving attention and that the petitioner should not instal the machinery before obtaining the permission sought for will not be an order within the meaning of section 250 of the Act and that such an interim communication cannot amount to a refusal of permission asked for. The petitioner's application must be deemed to have been granted by the Municipality under section 321 (11) of the Act.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records from the Municipal Commissioner, Coimbatore Municipality in No. 32606/61/C. 17 dated 10th December 1964 and quash the order therein.

K. Ramachandran, for Petitioner.

K. Gopalaswami, for Respondent.

The Court made the following

ORDER.—The petitioner is running a flour mill in No. 8/177, Dr. Rajendra Prasad Road, Coimbatore. He applied to the Municipality on 27th April, 1961, under

* W.P. No. 891 of 1965. 28th September, 1967.

section 250 of the District Municipalities Act for permission to instal machinery for starting a flour mill in the abovesaid premises. No order was communicated by the Municipality within thirty days of the receipt of the application. Relying upon the provision in section 321 (11) of the District Municipalities Act, the petitioner assumed that his application had been allowed and put up the machinery. From 1961 onwards, he had been running his flour mill and applied for renewal of the licence in 1962, 1963 and 1964 paying the licence fee thereafter, but no orders were passed on those applications for renewal. But on 31st July, 1964, the Municipality passed orders rejecting his application relying on the circumstances that no installation of machinery could be allowed in the premises because it is situated in an area covered by the Town Planning Scheme and unless the scheme was varied, such installation could not be permitted. The petitioner states that by reason of section 321 (11) of the District Municipalities Act above referred to, he was entitled to proceed on the basis that the permission applied for by him had been granted and, therefore, the Municipality's orders issued to him subsequently in 1964 refusing his application would be invalid and without jurisdiction. Hence, he prays in this writ petition for the issue of a writ of *certiorari* quashing the aforesaid proceedings and also for restraining the Municipality from taking any further proceedings in pursuance of the above order.

In the counter-affidavit filed by the Municipality in this writ petition, it is alleged that on receipt of the application of the petitioner dated 27th April, 1961, a communication was sent to the petitioner under date 6th May, 1961 and served on the petitioner on 13th May, 1961 stating that his application was receiving attention and that the petitioner should not instal the machinery before obtaining the permission sought for. Subsequently the matter was placed before the Council and the Council by its resolution dated 9th August, 1961 recommended the installation subject to the approval of the Director of Town Planning, Madras. Thereafter, correspondence ensued between the Director of Town Planning, Madras and the Municipal Commissioner and it was protracted for a long time. On 6th May, 1964, the Director of Town Planning issued order stating that in view of the Town Planning Scheme in force, the required permission could not be granted. Again the matter was placed before the Council and it passed a resolution afresh refusing the application of the petitioner. Subsequently, a notice dated 20th January, 1965 was issued to the petitioner under section 250 of the Act directing the petitioner to remove the unauthorised installation within 7 days under threat of prosecution. A charge sheet was also prepared for prosecuting the petitioner in the Special First Class Magistrate's Court and it was at that stage, the present writ petition was filed.

In my opinion, the petitioner is on firm ground when he relies upon section 312 (11) of the District Municipalities Act which is in the following terms :—

" The acceptance by the Municipal Council of the pre-payment of the fee for a licence or permission or for registration shall not entitle the person making such pre-payment to the licence or permission or to registration, as the case may be, but only to refund of the fee in case of refusal of the licence or permission or of registration; but an application for the renewal of a licence or permission or registration shall until communication of orders on his application be entitled to act as if the licence or permission or registration had been renewed; and save as otherwise specially provided in this Act, if orders on an application for licence or permission or for registration are not communicated to the applicant within thirty days after the receipt of the application by the (executive authority) the application shall be deemed to have been allowed for the year or for such less period as is mentioned in the application, and subject to the law, rules, by-laws, regulations and all conditions ordinarily imposed. "

This sub-section is in three parts. Each part is separated by a semi-colon, and each part deals with a distinct matter. The first part deals with the consequences of acceptance of the pre-payment of the fee for a licence or permission ; the second part deals with renewal of a licence or a permission ; and the third part is quite inde-

pendent and state that save as otherwise specially provided in this Act, if orders on an application for licence or permission or for registration are not communicated to the applicant within thirty days after the receipt of the application by the executive authority, the application shall be deemed to have been allowed for the year or for such less period as is mentioned in the application, and subject to the law, rules, bylaws, regulations and all conditions ordinarily imposed.

In the first place, this provision will cover both the cases of application for a licence as well as application for grant of permission. One can visualise an application for a licence in cases falling under section 249 of the District Municipalities Act which enjoins the necessity for licence in the cases mentioned in that section. Section 250 deals with the necessity to make an application for permission to undertake several items of work like construction or establishment of a factory etc., mentioned in that section. The reference to the words 'licence or permission' in section 321 (11) shows that that section was intended to deal with cases of application for licence as well as application for permission and, therefore, section 250 is also included for the purpose of section 321 (11).

In *Public Prosecutor* v. *Karuppiah Pillai*[1], dealing with a parallel provision under section 96 (3) of the Panchayat Act, Somasundaram, J., observed that the order with which section 321 (11) requires to be communicated within thirty days of the receipt of the application by the executive authority need not always be a final order either granting or refusing the licence applied for and that they may be in the nature of interim orders refusing to grant the licence pending further enquiry or receipt of the report called for on the application for licence. The learned Counsel for the Municipality states that the interim communication dated 6th May, 1961, to the petitioner referred to in the counter-affidavit would fall within such a communication mentioned in the judgment just now cited. But as against this, there is another decision of Somasundaram, J., in *The Public Prosecutor* v. *Krishna Rao*[2]. It was a decision dealing with a case under sections 250 and 321 (11) of the District Municipalities Act. The learned Judge observed that the communication of an interim order (of the kind mentioned above) must be by the Municipality that any such communication by the Commissioner of the Municipality stating that his application is under consideration and that the work should not be commenced till the permission is granted will not be an order within the meaning of section 250 of the Act and that such an interim order. by the Commissioner cannot amount to a refusal of the permission asked for. The learned Judge held that in circumstances, section 321 (11) should be applied and the permission must be deemed to have been granted for the installation of the machinery.

It is contended by the petitioner that the interim communication in this case, dated 6th May, 1961, was only by the Executive Officer of the Municipality and this fact is not denied by the respondent-Municipality. In view of the above, I am of opinion that the petitioner is justified in contending that his application must be deemed to have been granted by the Municipality under section 321 (11) of the Act.

The writ petition is, therefore, allowed and a writ of *certiorari* will issue as prayed for. The petitioner will get his costs from the respondent. Advocate's fee Rs. 150.

S.V.J. *Writ allowed.*

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1. (1957) 2 M.L.J. 7.
2. I.L.R. (1958) Mad. 330 : (1957) 2 M.L.J. 637.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

The Management of the Vaikundam Estate, Marthandam, Kanyakumari District represented by Sri S. S. Sarma, M.A. B.L., (former Superintendent, now Director) .. *Petitioner**

v.

Sri T. S. Ramaswami, Arbitrator, Ramavarmapuram, Nagercoil, and another .. *Respondents.*

Industrial Disputes Act (*XIV of* 1947), *section* 10-A—*Scope*—*Distinction between industrial arbitration on the one hand and commercial or statutory arbitration on the other*—*Powers of arbitrator under section* 10-*A*—*Reference under section* 10-*A as to whether the workers concerned were permanent labourers eligible to the benefits under the Plantations Labour Act*, (LXIX of 1951)—*Scope of.*

An Arbitrator under section 10-A of the Industrial Disputes Act is not in the same position as an Arbitrator in commercial disputes or in civil disputes. The later type of Arbitrator has to be bound strictly by the terms of the law as applied to the rights of parties and in a sense takes the place of a Court of law for deciding a dispute between parties, but in industrial Arbitration, the Arbitrator's powers are much wider ; his enquiries can be spread out on a larger field, so that he can decide for himself, the best way to find out a solution for bringing to an end the dispute referred to him.

[Authorities bearing on the distinction between industrial arbitration on the one hand and commercial as well as statutory arbitration on the other, quoted.]

Where the point referred to arbitration under section 10-A was 'whether any or all of the workers concerned are to be treated as permanent labourers and whether they are eligible to get the benefits under the Plantations Labour Act, 1951' and the Arbitrator held that the workers were permanent field workers, that consequently that they were entitled to the benefits of the Plantations Labour Act such as umbrella and protective cloth, leave with wages, sickness allowance, maternity allowance and provident fund, from the year 1958, and that they should also be paid 15 nP. increase in the wages per day in pursuance of an interim award by the Wage Board, on the question whether the Arbitrator went beyond the scope of the reference,

Held, (*i*) It is not possible to agree that the reference to arbitration did not include the period of permanent employmet and that the Arbitrator should have merely given a decision whether they were permanent workers or casual workers. Therefore the Arbitrator did not travel beyond the scope of the reference when he decided that the workers were permanent workers even prior to 1958 and that the workers should therefore be given such benefits as are available to permanent workers from the year 1958:

(*ii*) With regard to the benefits of umbrella and protective cloth, leave with wages, sickness allowance and maternity allowance, a reference to the Plantations Labour Act shows that these are benefits made available to the plantation labourers under the statute. The Arbitrator has made it clear that he was mentioning these benefits as illustrations and that what he was really having in mind was that the workers were entitled to the statutory benefits under the Plantations Labour Act, which would necessarily include the above items. It cannot therefore be held that because the Arbitrator has specified certain items of the benefits he travelled beyond the scope of the reference ;

* W.P.No. 1070 of 1964. 19th April 1967.

(*iii*) But the Arbitrator travelled beyond the terms of the reference in making provision for provident fund and the interim award granted by the Wage Board as these benefits are not directly traceable as benefits conferred under the Plantations Labour Act being benefits conferred by other enactments. The award should be quashed to that extent only (this part of the award is separable and so the rest of the award, which is proper, may stand) ; and

(*iv*) In view of the wide powers of an industrial arbitrator, the Arbitrator cannot be said to have committed any impropriety in relying upon information, on a relevant matter, gathered by him behind the back of the management.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records from the first respondent of the proceedings relating to the arbitration between the workers of the Vaikundam Estate and the Management and quash the Award dated 18th April, 1964, and published in *Fort St. George Gazette* dated 6th May, 1964.

M.R. Narayanaswamy, for Petitioner.

S. Ramaswamy for *S. Mahadevan* and *G. M. Ramachandran*, for 1st Respondent.

B. R. Dolia for *S. Padmanabhan*, for 2nd Respondent.

The Court made the following

ORDER : In this Writ Petition, filed under Article 226 of the Constitution of India, the scope of the powers of an Arbitrator, to whom the parties to an industrial dispute have made a voluntary reference under section 10-A of the Industrial Disputes Act (XIV of 1947) (hereinafter called the Act) comes in for consideration. The employer is the management of the Vaikundam Estate, Marthandam, in the Kanyakumari District, who is the petitioner in this Writ Petition. The Arbitrator is Sri T. S. Ramaswami, the first respondent, and the workers of the Vaikundam Estate are represented by the Secretary, Kumari Estate Workers' Union, Nagercoil, Kanyakumari District, the second respondent. A number of workers of the estate (42) filed claim petitions under section 33-C (2) of the Act, contending that they were permanent field workers in the estate which maintains a plantation, that they had been denied several benefits to which they were entitled under the provisions of the Plantations Labour Act, 1951, by the management, and that the right to these benefits should be determined and their quantum also determined. While these claim petitions were pending, the parties filed a joint memorandum agreeing to refer their disputes to arbitration, and the joint memorandum mentioned that the point referred to arbitration was whether any or all of the 42 workers referred to in the list attached are to be treated as permanent labourers and whether they are eligible to get the benefits under the Plantations Labour Act, 1951.

Before the Arbitrator both the workers and the management elaborated their claims. A reference to the claim statement on behalf of the workers shows that they placed before the Arbitrator for decision (*a*) claim to bonus from 1958-59; (*b*) claim to provident fund from 1959-60 (*c*) claim to umbrella and protective cloth from 1958-59 ; (*d*) claim to leave with wages from 1958-59 and (*e*) a claim also to an additional benefit by way of 15 nP. increase in the wages per day in pursuance of an interim award by the Wage Board. The management in their statement before the Arbitrator urged that the claim to bonus and wage increase fell outside the terms of the reference to the Arbitrator and therefore could not be decided by him. The management next alleged that each of the workers should independently establish their claim to be a permanent worker for the period he was claiming relief. There was also a reference to the fact that the workers' union had given notice of a strike on 21st July, 1958, and there was a reference for settlement of the dispute to adjudication under section 10 (2) of the Plantations Labour Act, 1951, and the award of the Labour Court in that connection was published in the *Gazette* on 20th April, 1960. The management urged that that award would show that the

workers were not permanent. The management pressed the claim that the workers were really casual workers and were not entitled to the benefits claimed.

The Arbitrator, however, in his award found (1) that the 42 workers were permanent field workers of the Vaikundam Estate ; (2) that consequently they were entitled to the benefits of the Plantations Labour Act such as umbrella and protective cloth, leave with wages, sickness allowance, maternity allowance from the year 1958 and provident fund from the year 1959 ; and (3) that they should also be paid the increase of wage of 15 nP. as per interim wage award passed by the Wage Board from the date of the award. The Arbitrator also directed that the arrears due to the 42 workers under the award should be paid by the management within a period of three months from the date of the award.

Learned Counsel appearing for the petitioner-management, in this writ petition attacks the above award of the Arbitrator on the following grounds—

(1) The Arbitrator in giving a decision about the benefits like umbrella and protective cloth, leave with wages, sickness allowance and maternity allowance from the year 1958, went really beyond the terms of the reference to the arbitration, and the award, therefore, should be treated as vitiated. In any event, if certain general principles applicable to awards by Arbitrators are to be applied, it should be possible to strike out the portions of the award which travel beyond the terms of the reference as outside the jurisdiction of the Arbitrator and maintain only that portion of the award which fell within the terms of reference.

(2) The direction for the payment of provident fund from the year 1959 and the direction to pay the increase of wages of 15 nP., as per interim wage award passed by the Wage Board are not strictly benefits under the Plantations Labour Act, but benefits under other enactments or awards and therefore, inclusion of these amounts in the claim by the workers must also be construed as beyond the jurisdiction of the Arbitrator.

(3) The Arbitrator in passing his award has committed serious impropriety in relying upon information gathered by him behind the back of the petitioner. Reference was made to paragraph 13 of the awrard where the Arbitrator has stated that he had made enquiries of one M. M. George, the previous Superintendent of the Vaikundam Estate revealing that the 42 field workers were treated as permanent workers during his period of office. Reference was also made to the muster roll maintained by Mr. M. M. George for the field workers, and a perusal of that muster roll in the office of the management showed that the names of the 42 workers were found therein. It was urged that the said Mr. George the previous Superintendent, was not examined as a witness on either side, and the Arbitrator violated the principles of natural justice in relying upon information supplied by George. In fact, Mr. George himself had maintained wage slips during his term of office and these wage slips would afford evidence contrary to the statement given by George to the Arbitrator. The Arbitrator has referred in paragraph 12 of his award that he made enquiries, from which he learnt that other estates maintain permanent men in field section also. This was also attacked as information which the Arbitrator had gathered behind the back of the management.

Learned Counsel Sri M. R. Narayanaswami, appearing for the management, referred to a certain important principle in the Law of Arbitration namely that an Arbitrator would be acting without authority if he travelled beyond the terms of reference. At the same time, he also made reference to the observations of Russel on Arbitration (17th edition) at page 347.

" If, notwithstanding that some portion of the award is clearly void, the remaining part contains a final and certain determination of every question submitted, the valid portion may well be maintainable as the award, the void part being rejected. "

At the same page the learned commentator observed :—

> " If the Arbitrator has executed his authority as to part of the award only, and the bad part is clearly separable from the rest of the award, and does not affect the good part, the good part may be allowed to stand ; the mere presence of superfluous matter does not invalidate an award."

Observations of Halsbury's Laws of England, Simonds' Edition, Volume 2, at pages 43 and 44 to the same purport were also relied on. The decision of the Supreme Court in *Jivarajbhai* v. *Chintamanrao*[1], dealt with a case of commercial arbitration wherein the Supreme Court observed that in that case it was impossible to separate from the award the portion which was within the jurisdiction of the Arbitrator and the portion which was outside, and therefore, the award must fail in its entirety. This decision was also quoted by the petitioner's learned Counsel.

Per contra, learned Counsel appearing for the workers has referred to an important distinction between arbitration in commercial matters or in case of civil disputes on the one hand and industrial arbitration on the other. He urges that the approach to industrial arbitration must be different from the approach to arbitration in commercial disputes and civil disputes. In the latter types of arbitration, the Arbitrator is strictly bound by the legal requirements of relevant statutes including the provisions of the Indian Arbitration Act. For stressing this distinction, reference was made to section 10-A (5) of the Act, which states specifically that nothing in the Arbitration Act, 1940, shall apply to arbitration under that section. It was urged that industrial arbitration is primarily designed to bring about industrial peace and provide effective means to settle the dispute that brought about the intervention of the Arbitrator and for securing industrial peace. Reference was also made to the provisions in section 10 (4) of the Act, which says that when an industrial dispute is referred to a Labour Court or Tribunal or National Tribunal under section 10, the Tribunal shall confine its adjudication to the points referred and matters incidental thereto, but in the case of reference to arbitration, there is no such restriction found in the Act. In section 10-A what is mentioned is an industrial dispute which is referred to the Arbitrator and the Arbitrator in passing the award thereafter really brings about a settlement of the dispute.

The essential distinction between industrial arbitration on the one hand and commercial as well as statutory arbitration on the other, is pointed out in an early decision of the Federal Court reported in *W. I. Automobile Association* v. *Industrial Tribunal*[2], where at page 120 of the report it was observed :

> " The award of the Tribunal may contain provisions for settlement of a dispute which no Court could order if it was bound by ordinary law, but the Tribunal is not fettered in any way by these limitations. In Volume I of ' Labour Disputes and Collective Bargaining ' by Ludwig Teller, it is said at page 536 that industrial arbitration may involve the extension of an existing agreement or the making of new one, or in general the creation of new obligation or modification of old ones, while commercial arbitration generally concerns itself with interpretation of existing obligations and disputes relating to existing agreements. In our opinion, it is a true statement about the functions of an industrial tribunal in labour disputes."

In a decision reported in *Anglo American Tea Trading Co.* v. *Its Workmen*[3] (Srinivasan, J.) it has been observed that the Arbitrator appointed under section 10-A of the Act with a specific agreement that his decision shall be binding on the parties is not a statutory Arbitrator, that his authority does not depend on any statutory jurisdiction and that he is a private tribunal set up by an agreement. The jurisdiction of an Arbitrator under section 10-A is certainly different from that of an Industrial Tribunal under section 10. Against such an Arbitrator's decision assuming that a writ of *certiorari* can issue, unless it is made apparent that the Arbitrator gives a find-

1. A.I.R. 1965 S.C. 214.
2. (1949) F.C.R. 321 : (1949) F.L.J. 154 : A.I.R. 1949 F.C. 111.
3. (1963) 2 L.L.J. 752.

ing unsupported by any material and that the finding is so perverse that it cannot be supported, the Court cannot possibly interfere under Article 226 of the Constitution.

It is in the background of the above principles that we have got to approach the circumstances of the present case. I have already referred to the fact that the specific points referred to the Arbitrator for decision arose in the background of claim petitions under section 33-C of the Act for determining the extent of the benefits available to the workers including the claim for bonus based upon their being permanent workers and for determining the quantum of those benefits. Therefore, the first point referred to the Arbitrator for decision whether any or all of the 42 workers referred to in the list attached are to be treated as permanent labourers, would also include the question of the period covered by the permanent employment. I must stress once again the fact that the dispute arose in the context of determining the quantum of benefits payable to the workers depending upon whether their employment was permanent or not and this will again depend on the period of such permanent employment. Therefore, it is not possible to agree with the contention of the petitioner that the reference to arbitration did not include the period of permanent employment and the Arbitrator should have merely given a decision whether the workers were permanent workers or casual workers. A reference was also made to the statement of claim by the workers before the Arbitrator which shows that they laid equal stress on their permanency of the employment as well as the period of such permanent employment which continued un-interrupted from the time of the previous management till 1958, when the present management took over the estate, and continued uninterruptedly thereafter. I am of the opinion that the Arbitrator did not travel beyond the scope of the reference when he decided that the workers were permanent workers, that they were being treated as permanent workers even prior to 1958 and that in view of the above, they should be given such benefits as are available to permanent workers from the year 1958 after which date admittedly the benefits were not given to them by the existing management.

Taking up the second point about the nature of the benefits of umbrella, protective cloth, leave with wages, sickness allowance and maternity allowance, a reference to the Plantations Labour Act, 1951, shows that these are benefits made available to plantation labourers under the statute. The Arbitrator has made it clear that he was mentioning these benefits as illustrations and that what he was really having in mind was that the workers were entitled to the statutory benefits under the Plantations Labour Act, which would necessarily include the above items. It cannot, therefore, be held that because the Arbitrator has specified certain items of benefits he travelled beyond the scope of the reference, which called upon him to determine whether the workers were eligible to get the benefits under the Plantations Labour Act.

In regard to bonus, the labourers put forward a claim to it. But the Arbitrator decided that bonus was outside the scope of the reference and therefore did not make an award in respect of it. But he appears to have given a decision about the workers being eligible to provident fund and also an interim wage award as per the award of the Wage Board. It is clear that these two items are not directly traceable as benefits conferred under the Plantations Labour Act, but benefits which other enactments conferred upon the workers, like the Provident Fund Act and the award of the Wage Board. Therefore, it appears to me that the Arbitrator did travel beyond the terms of the reference in making provision for provident fund and the interim award granted by the Wage Board. It would have been better if he had left these two items to be claimed by the workers independently on the basis of the present award recognising their status as permanent workers from the year 1958. The award will be quashed to the extent it refers to the provident fund and the interim award awarded by the Wage Board.

In view of my decision that the terms of reference include also the period of the permanency, which has relation both to the background of the dispute as well as

the computation of the benefits under the Plantations Labour Act, it is unnecessary to refer to the elaborate argument of the learned Counsel for the petitioner based upon the scope of section 17-A of the Industrial Disputes Act and the decisions thereunder relating to the date of commencement of an award. In effect, the Arbitrator has not said anything about the date of commencement of the award, but he has gone to the substance of the claim regarding the benefits under the Plantations Labour Act to permanent workers and held that in this case the workers were permanent workers even prior to 1958 and they would be entitled to the benefits under the Plantations Labour Act, which were not paid to them subsequent to 1958.

Regarding the argument that the Arbitrator took into account the result of enquiries made by him in other estates and also his questioning one Mr. Geroge, the previous Superintendent of the Vaikundam Estate, it appears to me that such enquiries cannot be considered to be beyond the scope of the Arbitrator's investigation when a dispute like the present one is referred to him. As mentioned already, the Arbitrator in such a reference is not in the same position as an Arbitrator in commercial disputes or ir civil disputes. The latter type of Arbitrator has to be bound strictly by the terms of the law as applied to the rights of parties and in a sense takes the place of a Court of law for deciding a dispute between parties, but in industrial arbitration, the Arbitrator's powers are much wider; his enquiries can be spread over a larger field, so that he can decide for himself, the best way to find out a solution for bringing to an end the dispute referred to here. One may refer to the following observations found in a publication of the I.L.O., *viz.*, "Conciliation and Arbitration in Industrial Disputes", which are extracted in the decision in *Baktavatsalu* v. *Chrome Leather Co.*[1] :

> " In disputes on collective interests, knowledge of the circumstances ' is needed to enable the conciliation or arbitration institution to form an opinion as to what regulation of the dispute will first be voluntarily adopted by the parties or what compulsory solution is likely to be the most just, if need be with due reference to public interests. "

The Arbitrator in the present case was justified in finding out the practice in other estates regarding the question whether permanent workers were allowed to work in the field section especially in view of the fact that the management had contended that the workers were working in the field section, and that on that account they could not be deemed to be permanent. The enquiry of the Arbitrator was therefore made to make himself familiar with the practice in the industry in regard to such workmen. It cannot be held that the Arbitrator went out of his way in gathering such information. Secondly his questioning of Mr. George was also to obtain a relevant piece of information, because Mr. George was the Superintendent of the Vaikundam Estates before the present management took over and he had maintained a muster roll which was available in the office of the present management and which the Arbitrator had necessarily to peruse in the context of the settlement of the present dispute. This apart, even if one were to exclude the items of information above referred to, there were other data before the Arbitrator and which he has referred to in the award, for supporting his findings. For the aforesaid reasons, I am of opinion that the award of the Arbitrator in the present case has not erred on any of the grounds urged by the petitioner, and that it has got to be upheld except in regard to the direction in respect of the provident fund and the interim award of additional wages awarded by the Wage Board. In respect of those latter claims, the workers will have to establish their rights independently as they do not directly fall within the benefits under the Plantations Labour Act, which was the subject-matter of the reference.

The writ petition is therefore, allowed in part, and the award of the Arbitrator is struck down so far as the direction in respect of provident fund and the increase of

1. (1949) 1 M.L.J. 119 : I.L.R. (1949) Mad. 924 : A.I.R. 1951 Mad. 856 at 859.

wages awarded by the Wage Board is concerned, but dismissed in other respects. There will be no order as to costs.

V.K. ——— *Petition allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT : MR. JUSTICE T. VENKATADRI.

H. D. V. Eustace .. *Petitioner**

v.

The General Manager, Southern Railway, Madras and another .. *Respondents.*

Disciplinary enquiry—Principles of res judicata *or* autrefois acquit—*Applicability—Disciplinary proceedings against railway servant—Proceedings abandoned and railway servant dismissed under rule* 149 *of the Railway Establishment Code Volume I—Said rule struck down by the Supreme Court later on—Railway servant reinstatea and fresh departmental proceedings started—Legality.*

The railway Administration suspended the petitioner, one of its servants, for misconduct and started disciplinary proceedings against him. Subsequently the Administration thought that the enquiry was unnecessary and that the services of the petitioner could be terminated under rule 149 of the Railway Establishment Code, Volume I. Accordingly the services of the petitioner was terminated under the said rule. Subsequently the Supreme Court struck down rule 149 as unconstitutional. Thereupon the petitioner was reinstated but fresh departmental proceedings were initiated against him. On the question of the legality of the proceedings thus initiated,

Held, the proceedings started could not be struck down as illegal.

The principle of *res judicata* cannot be applied to the facts of the case ; even assuming that such principle would apply also to domestic or departmental enquiries, as in this case it cannot be said that there was any prior decision in the matter.

The proceedings are not also barred by the principle of *autrefois acquit*. Nor can it be said that there are *mala fides* or bad faith on the part of the Railway in resuming the enquiry proceedings. The petitioner is not therefore entitled to a writ of prohibition restraining the Railway from proceeding with the enquiry.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of prohibition and restrain the respondents from proceeding with the enquiry in pursuance of their notice after calling for the records of the first and second respondents herein M/Con. 090/A dated 19th September, 1964.

K. N. Balasubramaniam and *M. Srinivasan*, for Petitioner.

S.K.L. Ratan and *B.T. Seshadri*, for Respondents.

The Court made the following

ORDER.—The petitioner herein is the Chief Inspector,, Communications, Southern Railway, Madras. He has filed the present petition for the issue of a writ of prohibition restraining the respondents, The General Manager, Southern Railway, and the Divisional Superintendent , Southern Railway, from proceeding with the enquiry in pursuance of their Memorandum M/Con. 090/A, dated 19th September, 1964.

On 26th August 1963 at about 1 P.M., when accordingto the affidavit, the petitioner entered the office-room of one Gupta, Divisional Engineer, Signal and Tele-

* W.P. No. 1660 of 1964. 24th April 1967.

communications, to ascertain the reasons for some directions given by the said Gupta to him, Gupta got excited and assaulted the petitioner. Immediately, the petitioner gave a complaint to the Divisional Superintendent of Railways, against the unprovoked assault by Gupta. It is stated that he was treated for the injuries and that he has obtained a medical certificate for the injuries sustained by him.

Equally, Gupta gave a complaint, on the same day, that the petitioner came to his room and asked him whether he had instructed the Inspector of Communications not to give him any position of control failure etc., on the phone and when Gupta replied in the affirmative, the petitioner assaulted him and slapped him on his face very hard causing injuries on the face.

The whole incident happened in the office-room of Gupa. It was only on hearing the shouts, shrieks and screams from the office-room of Gupta, two persons rushed into it, and they heard the incident as narrated by Gupta.

On the same day, the Administration suspended the petitioner and started disciplinary proceedings against him. Subsequently, the Administration thought that enquiry was unnecessary and that the services of the petitioner could be terminated under Rule 149 of the Railway Establishment Code, Vol. 1. Accordingly, the Railway Administration did terminate the services of the petitioner, in accordance with Rule 149 of the Code, and also required him to vacate the Railway quarters.

Subsequently, the Supreme Court held that Rule 149 of the Indian Railway Establishment Code, Vol. 1, was inoperative and unconstitutional. Thereupon, the petitioner wrote to the Administration to reinstate him in service. The Divisional Superintendent, by his order dated 26th May, 1964, reinstated the petitioner in service, treating the period of absence from the date of termination of services to the date of reinstatement 'as on duty'. Acting under instructions of the Railway Board, that, after reinstatement in such cases as the petitioner's the Department should initiate departmental proceedings, wherever it was feasible to do so, the Divisional Superintendent framed a charge against the petitioner on 19th September, 1964 to the effect that the petitioner assaulted Gupta on 29th August, 1963 in his room causing injuries on his face, and called upon the petitioner to submit his explanation. It is this enquiry which is now attacked by the petitioner, who wants to restrain the respondents by the issue of a writ of prohibition.

Learned counsel for the petitioner submits that once the authorities decided not to proceed with an enquiry against the petitioner but to terminate the services of the petitioner under Rule 149 of the Railway Establishment Code and when that Rule was subsequently held to be inoperative and unconstitutional, the same authorities cannot start the proceedings again after he was reinstated in service. According to learned counsel the principle of *res judicata* would apply to such a case.

The principle of *res judicata* would apply only if there was a prior decision between the parties. In this case, it cannot be said that there was any such prior decision given in the case against the petitioner, when the authorities were taking steps to conduct an enquiry against the petitioner. The Railway Administration thought that it was unnecessary to conduct an enquiry and that they could proceed to terminate the service of the petitioner under Rule 149 of the Code. It was on the ground that the services of the petitioner were terminated. Subsequently, Rule 149 was held to be unconstitutional by the Supreme Court. In view of that, the Railway Board gave general instructions as to how the cases of those employees whose services were terminated under Rule 149 were to be dealt with. One such instruction was that after reinstatement action to initiate departmental proceedings should be taken where it was feasible to do so. It was how the Administration began to take departmental proceedings against the petitioner after his reinstatement, in service. The principle of *res judicata* cannot, therefore, be applied to the facts of this case, even assuming that such principle would apply also to domestic or departmental enquiries.

Learned counsel for the petitioner next contends that the principle of *autrefois acquit* would apply to this case. In this connection, *Emperor* v. *Chinna Kaliappa Goundan*[1], has been cited before me. That case was heard and decided by a Full Bench of five Judges. That case arose on a reference by the Sessions Judge as to whether it was competent to a Magistrate, after dismissing a complaint under section 203 of the Code of Criminal Procedure, to rehear the complaint, when such order of dismissal had not been set aside by a higher Court. The majority judgment held that the dismissal of complaint under section 203 of the Criminal Procedure Code does not operate as a bar to the rehearing of the complaint by the same Magistrate, even when such order of dismissal has not been set aside by a competent authority. It was also held that the principle of *autrefois acquit* would not apply as there was no trial when the complaint was dismissed under section 203 of the Code. But learned counsel for the petitioner relies on the observations of Subramania Ayyar, J., in his dissenting judgment at page 138:

> " ....even where the plea of *autrefois acquit* is not technically available, the principle of it is available for the accused when the interests of justice require its extension in his favour. Bishop, in his commentaries on the law of Criminal Procedure, after pointing out that according to the better doctrine a person is in legal jeopardy when the jury is empannelled and ready to try him on a valid indictment and there is no latent or patent obstacle in the judicial path to prevent the cause proceeding to the end, observes then, if, contrary to his rights and without his consent, the cause is suffered to break off before a verdict of acquittal or conviction is reached, there cannot technically be a plea of *autrefois acquit* or *autrefois convict* by reason of this jeopardy, yet the prisoner is entitled in some way to rely upon it afterwards for his protection."

There may be some force in the contention of learned counsel for the petitioner. Still, in view of the majority decision in that case, I am of the opinion that there is nothing wrong in the authorities starting the enquiry against the petitioner on the facts and circumstances of this case. Further, the petitioner himself, as a matter of right, claimed to be reinstated as per the decision of the Supreme Court, and also received his salary for the period. When such is the case, he should also participate in the enquiry which is intended to be started against him by the Railway Administration. In this connection, learned counsel appearing for the respondents cited *Devendra Pratap* v. *State of Uttar Pradesh*[2], where their Lordships of the Supreme Court have observed that, after an order passed in an enquiry against a public servant imposing a penalty is quashed by a civil Court, a further proceeding can be commenced against him, if, in the proceeding in which the order qauashing the enquiry was passed, the merits of the charge against the public servant concerned were never investigated. In this case, though the Railway Administration started the proceedings, they never continued them, and they decided to take action under Rule 149 of the Railway Code. Therefore, when Rule 149 was struck down by the Supreme Court as unconstitutional, the Administration would be at liberty to continue the proceedings left unfinished.

It is next contended by learned counsel for the petitioner that the enquiry to be conducted by the Railway Administration would be a mockery, since the Administration has already made up their mind to terminate his services. It is submitted that the petitioner strongly suspects the *bona fides* and the motive of the authorities concerned in starting the enquiry against him.

It is an admitted case that on the date of the incident, two persons were involved in the incident, the petitioner and Gupta, the Divisional Engineer. Two complaints were preferred, one by the petitioner against Gupta, and the other by the said Gupta, against the petitioner. On the complaint preferred by the petitioner against Gupta, no orders appear to have been passed, and there is no indication available in the re-

1. (1966) 16 M.L.J. 79 : I.L.R. 29 Mad. 126. S.C.J. 282 : A.I.R. 1962 S.C. 1334.
2. (1962) 1 S.C.R. (Supp.) 315: (1962) 2

cords to show that the Department took any action on it. On the other hand, on the complaint preferred by the said Gupta, the Divisional Engineer, prompt action has been taken by the authorities to start the proceedings against the petitioner. The petitioner, therefore, apprehends that he may not get justice in the hands of the Railway Administration. There is considerabe force in the contention so put by the petitioner. As I said, there is nothing on record to show that any action worth the name has been taken by the Department, on the complaint of the petitioner. In all fairness, the Railway Administration should have considered both the complaints or they should have at least given a decision on the complaint of the petitioner, before starting the enquiry against the petitioner on the complaint given by Gupta. Learned Counsel for the petitioner cited the decision of the Supreme Court in *Barium Chemicals Ltd.* v. *Company Law Board*[1], where it is observed :

> " Though an order passed in exercise of power under a Statute cannot be challenged on the ground of propriety or sufficiency, it is liable to be quashed on the ground of *mala fides*, dishonesty or corrupt purpose."

But, in this case, I am not prepared, at this stage, to say that there are *mala fides* or bad faith on the part of the Railway Administration or that they have any motive in resuming the enquiry proceedings against the petitioner. The petitioner is not, therefore, entitled to writ of prohibition restraining the Railway Administration from proceeidng with the enquiry or the charge framed against the petitioner.

The writ petition is, accordingly, dismissed, but without costs.

V.K. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE T. VENKATADRI.

M. K. Mohamed Hussain and another .. *Petitioners* *

v.

The Central Board of Excise and Customs, New Delhi, and another .. *Respondentst*

Sea Customs Act (VIII of 1878), *sections* 167 (8) *and* 167 (81)—*Foreign Exchange Regulation Act (VII of* 1947), *section* 23 (1)—*Criminal Court acquitting accused of charge under section* 167 (81) *of Sea Customs Act and section* 23 (1) *of Foreign Exchange Regulation Act—If bars levy of penalty under section* 167 (8).

Merely because persons charged before a criminal Court with offences under section 23 (1) of the Foreign Exchange Regulation Act and section 167 (81) of the Sea Customs Act were either discharged or acquitted by the Criminal Court, it cannot be said that the customs authorities haveno jurisdiction to levy the penalty, on the same facts, on those persons under section 167 (8) of the Sea Customs Act.

Case-law discussed.

Petitions under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue writs of *certiorari* calling for the records relating to the order of the Central Board of Excise and Customs, New Delhi, Nos. 150 and 149 of 1964, respectively dated 13th October, 1964 confirming the order of the Collector of Central Excise. Madras, VIII/10/291/58 Cus.-Adj., dated 5th September, 1958 and quash the same,

K. K. Venugopal and *S. Ramalingam*, for Petitioners,

M. Ramaswami, for Respondents.

The Court made the following

ORDER.—The writ petitioners are brothers and they have filed these petitions to quash the orders of the Central Board of Excise and Customs, New Delhi, confirming

1. (1966) 2 Comp.L.J. 151 : (1966) 2 S.C.J. 623 : A.I.R. 1967 S.C. 295.

*W.P. Nos. 2121 and 2437 of 1965. 26th April, 1967.

the order of the Collector of Central Excise, Madras, in VIII/10/291/58 Cus. Adj. dated 5th September, 1958 imposing a penalty of Rs. 15,000 on the petitioner in W.P. No. 2437 of 1965 and Rs. 6,000 on the petitioner in W.P. No. 2121 of 1965. Penalty was imposed on the petitioners who were found to carry on smuggling activities, under section 167 (8) of the Sea Customs Act.

The case of the department is that these petitioners had been indulging in the smuggling of Indian Currency to Ceylon. On 21st October, 1957, the Postal Appraiser, during the course of interception of letters at the Foreign Exchange Post Office, Madurai, came across seven envelopes all addressed to the business premises of the petitioners at Colombo. The customs authorities took up further investigation of the matter and traced the petitioners. The currency was confiscated, and the petitioners themselves were contacted on their arrival in India and statements were recorded from them.

Separate criminal proceedings were launched against the petitioners under section 8 (2) read with section 23 of the Foreign Exchange Regulation Act and section 19 read with section 167 (81) of the Sea Customs Act. The petitioner in W.P. No. 2121 of 1965 was discharged. The petitioner in W.P. No. 2437 of 1965 was convicted by the Sub-Divisional Magistrate of Tuticorin both under section 23 (1) of the Foreign Exchange Regulation Act and section 167 (81) of the Sea Customs Act. But the Sessions Judge of Tirunelveli set aside the conviction of the petitioner in W.P. No. 2437 of 1965 under section 167 (81) of the Sea Customs Act and confirmed only the conviction of the petitioner under section 23 (1) of the Foreign Exchange Regulation Act. The petitioner filed a criminal revision case to the High Court, and the State also filed an appeal against the acquittal of the petitioner under section 167 (81) of the Sea Customs Act. Holding that the act of the petitioner could at best amount to moral certainty which could not take the place of legal proof, this Court allowed the revision petition of the petitioner and dismissed the appeal of the State.

In the meantime, the Collector of Central Excise, Madras, took proceedings under the Sea Customs Act and imposed penalty as aforesaid on the petitioners under section 167 (81) of the Sea Customs Act, which was confirmed by the Central Board of Revenue, New Delhi.

Learned Counsel for the petitioners contends that in the case of the petitioner in W.P. No. 2121 of 1965 once the criminal Court has discharged the petitioner of an offence arising out of the same transaction on the ground that no *prima facie* case was made out, the Central Board of Revenue would be bound to set aside the penalty and that the failure to do so has rendered the order illegal and void. In the case of the petitioner in W.P. No. 2437 of 1965, it is contended that the charge under section 167 (8) of the Act the petitioner having been acquitted of the criminal charge, the order levying penalty is illegal and void. He also contends that no person should be prosecuted and punished for the same offence more than once under Article 20 (2) of the Constitution.

Discussing the question as to how far the finding of the criminal Court would be binding on Administrative Tribunals enquiring on identical charges upon identical facts, Anantanarayanan, Officiating C.J. (as he then was) laid down the following broad principles in *Shaik Kasim* v. *Superintendent of Post Offices*[1]. An administrative authority, in initiating disciplinary proceedings, is not bound to wait for the verdict of a criminal Court. But where criminal Court has tried the concerned person and acquitted him, it would be improper and such a proceeding is liable to be quashed as not in accordance with the principles of natural justice if the administrative authority later initiates disciplinary proceedings on the identical facts, and identical charge and records a contrary conclusion. The learned Judge hastened to add that the acquittal should have been substantially on the merits ; technical acquittals on grounds like sanction may not inhibit departmental disciplinary proceedings or a contrary verdict therein. There could be no rigid or inflexible

1. (1965) M.L.J. (Crl.) 484 ; (1965) 2 M.L.J. 90 at 94.

rule that the finding of a criminal Court is conclusive, in every sense, upon administrative authority. If the finding is purely a technical acquittal, the administrative authority may conceivably punish, on the same facts. Bearing these principles, if we examine the facts of the present case, we see that the petitioner in W.P. No. 2121 of 1965 was discharged and the petitioner in W.P. No. 2437 of 1965 was acquitted as there was only a strong suspicion amounting to almost a moral certainty. Further in regard to section 167 (81) of the Sea Customs Act, it was set aside on the ground that, when the authorities decided on the particular facts to prosecute the offender, the conviction could only be under section 23 of the Foreign Exchange Regulation Act and could not be under the general provision of section 167 (81) of the Sea Customs Act. The conviction of the petitioner was, therefore, set aside under section 167 (81) on a technical ground.

In regard to the contention of learned Counsel for the petitioners that there cannot be a second punishment for the same offence, learned Counsel for the department cited *Rangarajan* v. *State of Madras*[1], where Kailasam, J. has observed that a departmental enquiry against a Government servant can be initiated on the basis of certain facts, even though the Government servant has been acquitted in a criminal prosecution on the same facts. The learned Judge has also observed :

> " No doubt it would be a strange predicament, if, in spite of a trial by a criminal Court on the same facts, the domestic tribunal were to come to a different conclusion on the same facts. But there cannot be a complete prohibition against the tribunal coming to a different conclusion, for it is well known that the tribunal is not bound by several rules that are binding on appreciation of evidence by a criminal Court. "

Learned Counsel for the department contends that the proceedings before the Department and proceedings before the criminal Court are two independent proceedings and that any decision rendered by the criminal Court cannot be taken into consideration in the departmental proceedings In that connection, he cites the decision of the Supreme Court in *Thomas Dana* v. *State of Punjab*[2], where their Lordships have brought out the distinction between the proceeding before Revenue authorities by way of enforcing the preventive and penal provisions of the Schedule to section 167 and a criminal trial before a Magistrate with a view to punishing offenders under the provisions of the same section. It is observed in *Leo Roy* v. *Superintendent, District Jail*[3], that under section 186, Sea Customs Act, the award of any confiscation, penalty or increased rate of duty under that Act by an officer of Customs does not prevent the infliction of any punishment to which the person affected thereby is liable under any other law. It is also observed in *Maqbool Hussain* v. *State of Bombay*[4], that in order that the protection of Article 20 (2) of the Constitution may be invoked by a citizen there must have been prosecution and punishment in respect of the same offence before a Court of law or a tribunal required by law to decide the matters in controversy judicially on evidence and not before a departmental tribunal which entertains a departmental or administrative enquiry. Thus the position herein seems to be clear that the proceedings before the customs authorities are independent of the proceedings before the criminal Court, and the adjudication of the one will not be binding on the other.

In regard to the contention of learned Counsel for the petitioners that the charge under section 167 (81) would cover the same field as charge under section 167 (8) of the Sea Customs Act and that the petitioner in W.P. No. 2437 of 1965 having been acquitted of the criminal charge, the order levying penalty is illegal, learned Counsel for the respondents relied on the decision of Jagadisan, J. in (*Krishna Chetty* v. *The Collector of Madras*[5] where it is observed :

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1. (1967) M.L.J. (Crl.) 136 : (1967) 1 M.L.J. 146 at 148.
2. (1959) S.C.J. 699 : (1959) 1 S.C.R. (Supp.) 274 : (1959) M.L.J. (Crl.) 474 ; A.I.R. 1959 S.C. 375.
3. (1958) S.C.J. 301 : (1958) S.C.R. 822 : (1958) M.L.J. (Crl.) 289 : A.I.R. 1958 S.C. 119.
4. (1953) S.C.J. 456 : (1953) S.C.R. 730 ; (1953) 2 M.L.J. 113.
5. W.P. No. 461 of 1959.

"On a plain reading of the two provisions of the statute, it seems to me that the two provisions do cover the same field. It is enough to point out that while section 167 (81) prescribes in terms knowledge or intention as a necessary or essential ingredient for the establishment of the offence, section 167 (8) does not refer to any knowledge or intention or even *mens rea* at all .... there is nothing inconsistent between the order of the learned Magistrate and the order of the Collector of Customs as the ingredients and requirements of section 167 (8) are not the same as those of section 167 (81) of the Act."

It is lastly contended that, once the High Court has acquitted the petitioner giving him the benefit of doubt, the Central Board of Revenue ought to have set aside the order of the Collector of Central Excise levying penalty. The High Court set aside the conviction of the petitioner under section 23 of the Foreign Exchange Regulation Act. The department has proceeded against the petitioner under section 167(8) of the Sea Customs Act. As pointed out in *Sewpujanrai Indrasenarai Ltd.* v. *Collector of Customs*[1], there is a distinction between a proceeding under section 23 of the Foreign Exchange Regulation Act and a proceeding under section 167 (8) of the Sea Customs Act. Their Lordships have observed, in that case, that section 23 of the Foreign Exchange Regulation Act is a proceeding against the offender, and is applicable to the person who contravenes any of the provisions of that Act, whereas section 167 (8) of the Sea Customs Act provides for two kinds of penalties when contraband goods are imported into or exported from India, one is a confiscation of the goods and the other is a penalty on the person concerned. Therefore merely because the petitioners were either discharged or acquitted by the criminal Court, it cannot be said that the customs authorities have no jurisdiction to levy the penalty on the petitioners under section 167 (8) of the Sea Customs Act. Apart from that, even assuming that the petitioners have not committed any offence under the Foreign Exchange Regulation Act, because the contraband goods have not crossed the frontiers of India, still as observed by the Supreme Court in *Narayandas Bhagwandas* v. *State of West Bengal*[2], even an attempt to take out the currency notes outside India is an offence punishable under the Sea Customs Act, as is clear from the provisions of section 167 (8). In the present case, the petitioners adopted a novel method of illegally exporting Indian currency in postal covers to their address in Ceylon and themselves going to Ceylon to receive the same. Upon the facts, I do not see any reason to interfere with the finding arrived at by the Customs authorities, in imposing penalty on them. There is no error of law or of jurisdiction.

The writ petitions are dismissed but without costs.

V.K. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE T. VENKATADRI.

T. S. Sivasubramanyam and another .. *Petitioners**

v.

The State of Madras, represented by the Deputy Secretary to Government, Department of Industries, Labour and Co-operation, Fort St. George, Madras and another ... *Respondents.*

Industrial Disputes Act (*XIV of* 1947), *section* 2 (k)—*Industrial dispute—Conversion of individual dispute into industrial dispute—Test Dispute relating to conduct of individual workmen—Workers as a class not affected.*

The test of conversion of an individual dispute into an industrial dispute is that it should affect the workers as a class, that it should be sponsored by a considerable number of workers of the establishment, that there should be community of interest between the workers or the union representing them and the employee

1. (1958) S.C.J. 1199 : (1959) S.C.R. 821 : (1958) M.L.J. (Crl.) 929 : A.I.R. 1958 S.C. 845.

2. (1960) 1 S.C.R. 93 : A.I.R. 1959 S.C. 1118.

*W.P. No. 719 of 1965. 22nd June, 1967.

whose dispute is sponsored by them and that a majority or a large section of the workmen employed in the particular industry should back the claim in dispute sponsored by a union of employees of different establishments and that further such workmen should feel themselves concerned in the dispute. Only in such circumstances can an individual dispute be said to become an industrial dispute.

Dispute concerning the conduct of an individual workman cannot be a matter which would affect the workers as a class, like bonus, conditions of services, etc.

Held, on facts, though the first petitioner is a member of the second petitioner union, his cause has not been sponsored by a large section or a substantial number of workmen of the establishment. Further it is a dispute concerning the conduct of an individual workman. It cannot be a matter which would affect the workers as a class, like bonus, conditions of service, etc. Only a handful of employees of the particular establishment have made common cause with the workman concerned. He has not the backing or sympathy of a large number of workmen employed in the establishment. The present dismissal of the workman by the employer has not converted what is an individual dispute into an industrial dispute.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the Government of Madras to refer the dispute raised on behalf of the petitioner by the Madras Kerosene Oil Workers' Union and covered by the conciliation report of the Conciliation Officer, Rt. No. 2201, dated 19th September, 1964 for adjudication under section 10 (1) of the Industrial Disputes Act, 1947.

K. K. Venugopal and *V. Manivannan*, for Petitioners.

The Assistant Government Pleader, for 1st Respondent.

P. V. Marthandam for *King & Partridge*, for 2nd Respondent.

The Court made the following

ORDER.—The question that arises for consideration in this petition under Article 226 of the Constitution is whether the order of the Government, refusing to refer the dispute in this case for adjudication on the ground that it is not an ' industrial dispute ' as defined in section 2 (*k*) of the Industrial Disputes Act, is one passed without jurisdiction.

Briefly stated, the facts of the case are these. The first petitioner was employed as a fitter in the Tondiarpet Installation of the Burmah-Shell Oil Storage and Distributing Company of India Limited, the second respondent herein. The first petitioner is a member of the second petitioner-Union. The Union is a registered one recognised by the management. That union is formed for the workers of the various companies dealing in kerosene oil storage and distribution. It is seen from the counter-affidavit filed by the first respondent-Government that out of 310 workers in the second respondent-Establishment only 65 were members of the second petitioner-Union. In 1963, the first petitioner was charge-sheeted for theft of certain articles in the installation. After a domestic enquiry, he was dismissed from service. Thereupon, the second petitioner-Union raised an industrial dispute in regard to the non-employment of the first petitioner. The Labour Officer held conciliation proceedings, and reported to Government that there was no possibility of a settlement through conciliation. The Government considered the report of the conciliation officer. It was also reported to Government that the Union did not have sufficient representative capacity to raise the demand. The Government were of the opinion that an industrial dispute did not exist, and therefore did not make a reference for adjudication. This petition is for the issue of a writ of *mandamus* to direct the State Government to refer the dispute raised on behalf of the first petitioner by the second petitioner-Union for adjudication under section 10 (1) of the Act.

As to what constitutes ' industrial dispute ', there has been acute controversy and conflict of opinion among the various High Courts. In 1953, in *D. N. Bannerji* v. *P. R. Mukherjee*[1], their Lordships of the Supreme Court had an occasion to discuss the meaning of the expression ' industrial dispute ' and were of the opinion that a single employee's case might develop into an industrial dispute when it was taken by a Trade Union of which he was a member and there was concerted demand by the employees for redress. In *Central Provinces Transport Service* v. *Raghunath*[2], his Lordship Venkatarama Ayyar, J., observed :

> " The question whether a dispute by an individual workman would be an industrial dispute as defined in section 2 (*k*) of the Act XIV of 1947 has evoked considerable conflict of opinion both in the High Courts and in Industrial Tribunals and three different views have been expressed thereon : (*i*) A dispute which concerns only the rights of an individual worker, cannot be held to be an industrial dispute ....(*ii*) A dispute between an employer and a single employee can be an industrial dispute as defined in section 2 (k) .... (*iii*) A dispute between an employer and a single employee cannot *per se* be an industrial dispute, but it may become one if it is taken up by the Union or a number of workmen. "

His Lordship further observed in his characteristic manner (at page 109) :

> " Notwithstanding that the language of section 2(*k*) is wide enough to cover a dispute between an employer and a single employee, the scheme of the Industrial Disputes Act does appear to contemplate that the machinery provided therein should be set in motion, to settle only disputes which involve the rights of workmen as a class and that a dispute touching the individual rights of a workman was not intended to be the subject of an adjudication under the Act, when the same had not been taken up by the Union or a member of workmen."

Their Lordships of the Supreme Court observed in *Indian Cable Co., Ltd.* v. *Its Workmen*[3], that a dispute in order to become an industrial dispute must be such as to lead to an inference that the dispute was one which affected workmen as a class. In the words of their Lordships (page 415) :

> " What imparts to the dispute of a workman the character of industrial dispute is that it affects the rights of the workmen as a class .... No hard and fast rule can be laid down as to the number of workmen whose association will convert an individual into an industrial dispute. That must depend on the facts of each case, and the nature of the dispute. The group might even be a minority .... But it must be such as to lead to an inference that the dispute is one which affects workmen as a class. "

In the instant case, the second petitioner-Union, which is espousing the cause of rhe first petitioner-workman, is not a Union of all the workmen of the second respondent-Establishment. Even according to the affidavit of the first petitioner, there are about 400 workers employed in the company at its Tondiarpet Installation, that 80 of these workers belonged to the second petitioner-Union and that out of these 80 persons only 47 voted for the resolution authorising the Union to espouse the cause of the first petitioner. On these facts, can we say that a considerable section of the workmen has made common cause with the individual worker to raise an industrial dispute and whether this would impart to the dispute of the workman the character of an industrial dispute as to affect the rights of the workmen as a class. More or less a similar situation arose in *Bombay Union of Journalists* v. *' Hindu ', Bombay*[4]. In that case the services of a journalist of the Hindu, Bombay, were terminated by the management, and the journalist questioned the propriety of his termination. At the relevant time, the management of the Hindu, Bombay,

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1. (1953) 1 M.L.J. 195 : (1953) S.C.J. 19 : (1953) S.C.R. 302: A.I.R. 1953 S.C. 58.
2. (1957) S.C.J. 58 : (1956) S.C.R. 956 : A.I.R. 1957 S.C. 104 at 108.
3. (1962) 1 L.L.J. 409.
4. (1961) 2 L.L.J. 436 : (1962) 3 S.C.R. 893 : (1962) 2 S.C.J. 107.

had ten employees at Bombay, seven on the administrative side and three on the journalistic side. The dispute was espoused by the Bombay Union of Journalists. That union was a union not of employees of one employer but of all employees in the industry of journalism in Bombay. Only two journalists of the *Hindu*, Bombay, including the affected journalist were members of this union. The State of Bombay referred the dispute for adjudication. The management of the *Hindu* challenged the validity of the reference on the ground that it was only an individual dispute which was not supported by an appreciable number of employees of the *Hindu*, Bombay. The Industrial Tribunal upheld the contention of the management, and on appeal, their Lordships of the Supreme Court observed (at page 439) :

> " The dispute, in the present case, being *prima facie*, an individual dispute, in order that it may become an industrial dispute it had to be established that it had been taken up by the union of employees of the *Hindu*, Bombay or by an appreciable number of employees of the *Hindu*, Bombay..........
>
> By its constitution the Bombay Union of Journalists is a union not of employees of one employer, but of all employees in the industry of journalism in Bombay. Support of the cause, by the union, will not in our judgment convert the individual dispute of one of its members into an industrial dispute ....The principle that the persons who seek to support the cause of a workman must themselves be directly and substantially interested in the dispute in our view applies to this class of cases also ; persons who are not employees of the same employer cannot be regarded as so interested, that by their support they may convert an individual dispute into an industrial dispute. "

This principle has been followed by the Andhra Pradesh High Court in *Express Newspapers* v. *Labour Court*[1]. There it is held that a union which is not a union of employees of the company but a union of the employees of other employers cannot be said to be directly or substantially interested in the employment or non-employment of an individual workman in the establishment. The Division Bench of that Court observed at page 204 :

> " There should be community of interest between the workers or the union representing them and the employee or employees whose dispute is sponsored by them. If such community of interest does not exist, the other workmen or their union cannot adopt the dispute. "

The learned Judges have observed at page 205 that mere promise of help by an outside agency in any attempt it may make to secure the redressal of the grievances of an individual worker is not tantamount to sponsoring the cause of an individual worker and as such an individual dispute cannot acquire the status of an industrial dispute. The Calcutta High Court has taken the same view in *Gobordhandas Jeerambhai* v. *Sixth Industrial Tribunal*[2]. In this case, a partnership business carrying on business in the export of tea and gunny had about 25 workmen. At the relevant time, five workmen were employed in the tea department and two of them were members of a general union. When one of the two was retrenched from service and the union espoused his cause, it was held that when a union unconnected with the employer industry concerned took up the cause of a dissatisfied workman, the dispute did not automatically transform itself from an individual dispute to an industrial dispute. The learned Judge observed thus at page 165 :

> " The real test is whether the stranger union has the backing, sympathy or collaboration of the majority or a large section of the workmen employed in the particular industry and such workmen feel themselves concerned in the dispute. "

In *Vazir Sultan Tobacco Co.* v. *State of Andhra Pradesh*[3], a workman was dismissed from service. The dispute in regard to his dismissal was taken up by 104 co-workemen out of 2,170 workmen in the establishment. It was held by the Andhra Pradesh

1. (1962) 2 L.L.J. 200.
2. (1963) 1 L.L.J. 163.
3. (1964) 1 L.L.J. 622.

High Court that the support of 104 workmen was not sufficient to convert the individual dispute into an industrial dispute *i.e.*, the number of workmen who supported the cause of the dismissed workmen could not be called appreciable or substantial and that the workmen in other establishments though engaged in the same line of business could not be said to have any direct or substantial interest in the cause of such dismissed employee and hence their support could not convert the individual dispute into an industrial dispute.

It is clear from the above decisions that the test of conversion of an individual dispute into an industrial dispute is that it should affect the workers as a class, that it should be sponsored by a considerable number of workers of the establishment, that there should be community of interest between the workers or the union representing them and the employee whose dispute is sponsored by them and that a majority or a large section of the workman employed in the particular industry should back the stranger union and that further such workmen should feel themselves concerned in the dispute. Only in such circumstances can an individual dispute be said to become an industrial dispute.

Let me analyse the facts of this case with this background in view. The workman was employed as a fitter in the Tondiarpet installation of the second respondent company. There are about 400 workers in that establishment. Only 80 workers are members of the union, which is not of the employees of one employer but of employees of several companies dealing in kerosene storage and distribution. It is stated that only 47 workers supported the cause of the worker who was dismissed from service for theft of certain articles from the installation. The workman has been dismissed after a properly conducted domestic enquiry. It is a case of misconduct on the part of the first petitioner. Though the first petitioner is a member of the second petitioner union, his cause has not been sponsored by a large section or a substantial number of workmen of the establishment. Further it is a dispute concerning the conduct of an individual workman. It cannot be a matter which would affect the workers as a class, like bonus, conditions of service, etc. Only a handful of employees of the particular establishment have made common cause with the workman concerned. He has not the backing or sympathy of a large number of workmen employed in the establishment. For these reasons, I hold that the present dismissal of the workman by the employer has not converted what is an individual dispute into an industrial dispute.

During the course of the arguments, the question whether at all a writ of *mandamus* could lie on the facts and circumstances of the case came up for consideration. Learned Counsel for the petitioners contended that the order passed by the Government was very cryptic, that it had taken into consideration extraneous matters such as the confidential report of the Labour Officer and that in such circumstances a writ of *mandamus* would lie against the Government.

The Supreme Court had an occasion to consider under what circumstances a writ of *mandamus* would lie, in *State of Bombay* v. *Krishnan (K.P.) and others*[1], They have held that a writ would lie when the Government does not record and communicate to the parties its reasons for refusing to make the reference, when the refusal is not *bona fide*, and when the refusal is based on consideration of wholly irrelevant facts and circumstances. It is also held that the Government is not bound to base its decision only on a consideration of the report of the conciliation officer and that it would be open to the Government to consider other relevant facts which may come to its knowledge. It has been held in *Bombay Union of Jonrnalists* v. *State of Bombay*[2], that it is not necessary for the Government to write an elaborate order indicating exhaustively all the reasons that weighed in its mind in refusing to make a reference. It has been held in *Workmen in Southern Textiles* v. *State of Madras*[3], that the Government need not confine its attention only to the failure report submitted by the con-

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1. (1961) 2 S.C.J. 360: (1960) 2 L.L.J. 592 : (1961) 1 S.C.R. 227.
2. (1964) 1 L.L.J. 351 : (1964) 6 S.C.R. 22.
3. (1965) 2 L.L.J. 73.

ciliation officer but could also take into account all relevant circumstances and the confidential report. In the present case, the Government have considered the report of the officers and have come to the conclusion that the Union does not have sufficient representative capacity to raise the demand. Applying the principles stated above, I hold that the order of the Government is a proper order and that no writ can issue against the Government, on the facts and circumstances of this case.

The petition is accordingly dismissed but without costs :

S.V.J. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

Rajkumar Bhagwatsaran .. *Petitioner**

v.

Commissioner of Police, Madras .. *Respondent.*

Madras City Police Act (III of 1888), section 51-A—Scope—When can be invoked?

Prima facie, section 51-A is intended to deal with violent persons. The first limb of section 51-A (1) (*a*) refers to persons whose movements or acts are causing or are calculated to cause alarm, danger or harm to person or property. As alternative, the second limb of section 51-A (1) (*a*) refers to persons who on reasonable grounds can be believed to engage or about to be engaged in the commission of any offence involving force or violence or punishable under certain specified chapters of the Penal Code which includes Chapter XVII. Cheating which is the offence involved in the present case comes under Chapter XVII of the Penal Code and is therefore included within the second limb of this section. But section 51-A (1) proceeds to lay down a further requirement applicable to either of the above two limbs of section 51-A (1) (*a*) namely that witnesses are not willing to come forward to give evidence in public against such persons by reason of apprehension on their part regarding the safety of their person or property. Because of the use of the word 'and' between section 51-A (1) (*a*) and (*b*), it is reasonable to assume that this requirement is also essential, before proceedings are instituted against persons under the above section. But in the instant case there is no allegation that the petitioner is using force or threat to witnesses to prevent them from deposing against him. Hence the notice against the petitioner under section 51-A should be struck down as not being in accordance with the requirements of that section.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be to issue a writ of *certiorari* to quash the proceedings dated 3rd August, 1964 in C. No. 55/Ext /64 on the file of the Commissioner of Police, Madras.

Petitioner in person.

The Assistant Government Pleader on behalf of the Respondent.

The Court made the following

ORDER.—Petitioner Rajakumar Bhagwatsaran has filed this writ petition under Article 226 of the Constitution praying for the issue of a writ of *certiorari* quashing the notice issued to him by the Deputy Commissioner of Police, Crimes, Madras City, dated 3rd August, 1964 under section 51-A of the Madras City Police Act. The notice is in the following terms :

" *Whereas* information containing the allegations set out below for taking action under section 51-A, Madras City Police Act, has been laid before me by Sri Siva, sankaran, Detective Sub-Inspector of Police, Royapuram, P.S. Madras City, in

* W. P. No. 457 of 1965. 22nd September, 1967.

exercise of the powers conferred on me under section 51-A, City Police Act, 1888, I Sri S. Palaniappan, Deputy Commissioner of Police (Crimes), Madras City, call upon you to show cause within seven days from the date of receipt of this notice, as to why you should not be directed to remove yourself out of Madras City or why you should not be directed to conduct yourself in the manner as may be necessary to prevent causing any alarm, danger, harm to persons or property or commission of any offences, and that, in order to give an opportunity of tendering your explanation regarding the allegations, I have appointed 11 hours on the eighth day following your receipt of this notice, at the office of the Commissioner of Police Madras, to receive your explanation and to hear you or your Advocate and to peruse your written representation if any, and to hear your witnesses if any, in regard to the said allegations, failing which it will be construed that you have no explanation to offer and orders will be passed on the date specified for receiving your explanation. Take note.

Allegations.—You were not born in Madras City or Chingleput District or North Arcot District. On 3rd July, 1963 you were arrested in X. Cr. No. 266 of 1963 under section 55 Criminal Procedure Code and investigation disclosed that 8 months prior to 18th October, 1963 at Petty Munuswamy Chetty Street, you falsely represented to Sri W. R. Kadirvelu Mudaliar, S.H.P.M., Madras that you were an Advocate running a journal called "Who is Who" and that you would publish about the City S.H.P.Ms. and induced the witness to part with his photo and a sum of Re. 1 and thus cheated him.

Similarly about 8 months prior to 29th October, 1963 you cheated one Sri Ramachandra Mudaliar S.H.P.M. at No. 10, Flowers Road, Kilpauk by falsely representing to him that you were an Advocate running a journal called "Who is Who" and that you would " publish about the City S.H.P.Ms. and induced the witness to part with his photo and a sum of Rs. 5 and thus cheated him.

Similarly on 27th February, 1963 you cheated one Sri K. V. Ganapathy Iyer at No. 21, 2nd Cross Street, Kodambakkam by falsely representing to him that you were an Advocate holding B.A.B.L., Degree, journalist running a magazine called " Who is Who " and that you were the author of the film review in the Film Magazine. You also wanted to make a publication about the City S.H.P. Ms. and induced the witness to part with his photo and a sum of Rs. 5 and thus cheated him. Hence you were charged and convicted in H-3, Tondiarpet P.S. Cr.No. 1293 of 1963 section 420 Indian Penal Code to one year R.I. by th II Presidency Magistrate, George Town, Madras in C.C. No. 15606 of 1963, dated 31st March, 1964. Thus you have proved yourself addicted to commission of offence punishable under Chapter XVII of the Indian Penal Code. Your presence and stay in Madras City is a menance to the society."

The Petitioner urges that the three allegations involving offences of cheating mentioned in the above notice were the subject-matter of a Criminal Prosecution against him in C. C. No. 15606 of 1963 on the file of the Second Presidency Magistrate, George Town, Madras, in which he was convicted. He filed an Appeal before this Court, and the appeal was pending when the aforesaid notice was issued. He has alleged that the notice dealt with a matter which was pending consideration by this Court, regarding his commission of the above offences, and that to that extent it is illegal. The Petitioner has also contended that section 51-A of the Madras City Police Act, under which the above notice was issued, is unconstitutional, because it discriminates between persons who are born in the City of Madras or in the District of Chingleput or North Arcot on the one hand and other persons on the other, and that therefore, it should be struck down as unconstitutional.

It is not necessary to deal in this writ petition about the unconstitutionality of the provisions. That apart, *prima facie*, the section is intended to deal with violent persons. The first limb of section 51-A (1) (*a*) refers to persons whose movements or acts are causing or are calculated to cause alarm, danger or harm to person or property. As alternative, the second limb of section 51-A (1) (*a*) refers to person who

on reasonable grounds can be believed to engage or about to be engaged in the commission of any offence involving force or violence or punishable under certain specified chapters of the Indian Penal Code which includes Chapter XVII. Cheating which is the offence involved in the three allegations mentioned in the notice comes under Chapter XVII of the Indian Penal Code, and is therefore included within the second limb of this section. But section 51-A (1) (*b*) proceeds to lay down a further requirement applicable to either of the above two limbs of section 51-A (1) (*a*) namely that witnesses are not willing to come forward to give evidence in public against such persons by reason of apprehension on their part regarding the safety of their person or property. Because of the use of the word 'and' between section 51-A (1) (*a*) and (*b*), it is reasonable to assume that this requirement is also essential, before proceedings are instituted against persons under the above section. But in the present notice, there is no allegation that the petitioner is using force or threat to witnesses to prevent them from deposing to the three allegations mentioned in the notice. In actual fact, the three allegations have been the subject-matter of a criminal prosecution, at which the witnesses have already deposed and the petitioner had been convicted on their evidence. Subsequent to the notice, in the appeal of the petitioner in this Court, his conviction was confirmed but the sentence was reduced. There can, therefore, be no question of witnesses to speak to the three allegations mentioned in the notice being prevented by the petitioner by force from giving evidence against him, when in actual fact they had given evidence and the petitioner had been convicted on their evidence. On this short ground, it appears to me that the present notice against the petitioner should be struck down, as it is not in accordance with the requirement of section 51-A of the Madras City Police Act.

The petitioner appears before me in person and is not assisted by any Advocate. He is not able to produce necessary authorities as well as decisions of Courts for the purpose of examining the constitutionality of the provision under section 51-A of the City Police Act and giving a decision thereon. In view of that circumstance, I am not entering into the constitutionality of the provision, in this petition.

For the reasons mentioned above, the writ petition is allowed and the notice dated 3rd August, 1964 of the Deputy Commissioner of Police, Crimes, Madras City is quashed. But nothing mentioned in this order will prevent the authorities from proceeding against the petitioner, if other grounds are made out to justify proceeding under other appropriate provisions of the City Police Act. There will be no order as to costs.

V. K. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

Standard Motor Products of India Ltd. .. *Petitioner**

v.

The President, Panchayat, 167, Perungalattur, Chingelput District and others .. *Respondents.*

Madras Panchayats Act (XXXV of 1958), *sections* 120 *and* 158 *and rules* 2 (*a*) *and* 2 (*b*) (*ii*) *of Notification No.* 40*—Factory buildings—House-tax—Levy of—Appeal to Panchayat Board against assessment—Board referring the matter to Advocate for opinion and adopting automatically his opinion without exercising its independent judgment—Validity of—Revision to Government against assessment—Order of Government not in exercise of statutory power of revision—Validity of.*

The Panchayat Board has not come to an independent conclusion on the merits of the rival contentions, but was content with adopting automatically the opinion.

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* W.P. Nos. 30, 41 and 1127 of 1965 and 2208 of 1967. 4th October, 1967.

of the Advocate whom the Panchayat Board consulted. The Advocate can give an opinion only about a point of law. But the Panchayat Board ought to have given a finding on the facts, and then applied the law to those facts. Whether it be a finding on the facts or whether it be a finding on the law applicable to the facts found, the ultimate opinion must be that of the Panchayat in its independent judgment. The Panchayat Board appears to have mechanically accepted the opinion of the lawyer whom it consulted, and did not form its own opinion. Consequently neither the Panchayat Board nor the Government have given a conclusive decision on the matter after considering the facts of the case and failed to act in conformity with the statutory provision for appeal in the case of the Panchayat Board, and the statutory provision for revision in the case of the Government. Therefore, the orders of the Panchayat Board making a demand for property tax, and the order of the Government making more or less a direction *ex gratia* for reducing the demand are quashed.

Petitions under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavits filed therewith for W.P. No. 30 of 1965 and W.P. No. 2208 of 1967 and the affidavits with W.P. No. 30 of 1965 on the file of the High Court for the other writ petitions, the High Court will be pleased to issue writs of *certiorari* calling for the records relating to the house tax demands in No. 275605 in W.P. No. 30 of 1965, in F. No. 510377 in W.P. No. 41 of 1965 and in D. F. No. 501527 in W.P. No. 1127 of 1965 issued by the respondents respectively relating to the factory buildings of the petitioner for half years ended 30th September, 1964, 31st March, 1965 and 31st March, 1964 respectively in the above three writ petitions, and to direct the respondents therein to do their duty under the Madras Panchayat Act, 1958, and the rules framed thereunder, by assessing the buildings in question on the basis of the rental value and for calling for the records relating to the order dated 20th May, 1965 of the 3rd respondent in W.P. No. 2208 of 1967 and quash the said order.

V. Thiagarajan, for King & Patridge, for Petitioner.

V. Shanmugham, for Respondents 1 and 2.

J. Kanakaraj, for the Government Pleader, for 3rd Respondent.

The Court made the following

ORDER.—These writ petitions are dealt with together as certain common questions arise for decision. I will take up first the three writ petitions of the year 1965. They relate to the demand of property tax by the respondent, President, Panchayat, Perungalathur, Chingleput District, against the petitioner, Standard Motor Products of India Limited, for the half-years ending 31st March, 1964, 30th September, 1964 and 31st March, 1965. The petitioner, according to its affidavit, is a manufacturer of motor cars and their parts, and it has got its factory at Perungalathur, within the limits of the respondent panchayat. The levy of property tax on factory buildings is governed by the Madras Panchayats Act, 1958 (XXXV of 1958) (hereinafter called the Act). The factory building is a house as defined in section 2 (13) of the Act. That definition reads :

> "'house' means a building fit for human occupation, whether as a residence or otherwise............and includes any shop, workshop or warehouse or any building used for garaging or parking buses or as a bus-stand."

Rule 2 of the rules framed in Notification No. 40, by the Madras Government under the Act lays down the manner of ascertaining the annual or capital value of houses for the purposes of assessment to house tax Rule 2 (*a*) states :

> "The annual value of a house shall be deemed to be the gross annual rent at which the house may reasonably be expected to let from month to month, or from year to year, less a deduction of ten per centum of such annual rent and the said deduction shall be in lieu of all allowances for repairs or on any other account whatever."

Rule 2 (*b*) (ii) states :—

" In the case of any building falling within the definition aforesaid, of a class not ordinarily let, the gross annual rent of which cannot, in the opinion of the executive authority, be estimated, the annual value shall be deemed to be six per cent. of its capital value."

These rules were framed under section 120 (4) of the Act which enables the Government to make rules providing for the manner of ascertaining the annual or capital value of houses or the categories into which they fall for the purpose of taxation. It is clear from rules 2 (*a*) and 2 (*b*) (ii) extracted above, that buildings, for the purpose of levy of house-tax, fall broadly into two categories (1) buildings which may reasonably be expected to let from month to month or from year to year, in which event the annual value of the building on which the property tax is assessed, will be the gross annual rent at which it may reasonably be expected to let, less a deduction of ten per cent. of such annual rent, the deduction being in lieu of all allowances for repairs or on any other account whatever.; and (2) buildings of a class not ordinarily let, the gross annual rent of which cannot, in the opinion of the executive authority, be estimated, in which event the annual value shall be deemed to be six per cent. of its capital value.

In the case of the petitioner, the assessing authority reached the opinion that the building fell under the second category, that is, not capable of being ordinarily let, and levied property tax at six per cent. on the capital value. Relying upon the provision in rule 19 in Notification No. 3 isued by the Government and published in the *Fort St. George Gazette* dated 31st July, 1963, the petitioner filed an appeal to the Panchayat Board against the above order of assessment, urging that the building in question was capable of being ordinarily let, though it was not actually let, and that therefore the proper rule for fixing the annual value should be rule 2 (*a*) mentioned above and not rule 2 (*b*) (ii). The Panchayat Board appears to have referred the matter for the opinion of one Mr. M. R. Sundaramani, B.A., B.L., Advocate, Tambaram. This Advocate stated in his opinion, a copy of which was supplied to me, that in coming to a conclusion regarding the point in controversy, namely, whether a building is ordinarily capable of being let or not, it should be taken into account that the petitioner is one of the three factories producing small cars in India with the Government of India licence and foreign collaboration, and that the plan of the factory showed that the factory at Perungalathur was built to enable a continuous process of production and assembly of cars. The Advocate stated in his opinion that the factory belonged to a class of buildings not ordinarily let and therefore the annual value should be assessed under rule 2 (*b*) (ii) of Notification No. 40 above mentioned. When this opinion of the Advocate was received, the Panchayat Board disposed of the appeal of the petitioner by observing thus:

" The said appeal was referred to the Advocate, who advised that the tax could not be reduced. Based on this, it is resolved unanimously to reject the appeal, and to collect the tax based on the original notice."

This order was passed on 21st September, 1964. Thereafter the petitioner filed the three writ petitions mentioned above in connection with the demands for property tax for the three half-years mentioned therein, questioning the propriety of the finding of the Panchayat Board in the appeal that the buildings of the petitioner fell under rule 2 (*b*) (ii) of Notification No. 40. It is alleged in the affidavit filed in support of the petitions by one Ganesh Rao, the Secretary of the petitioner-company that the structure of the building would indubitably establish that it can be let out for factory purposes. It is also alleged that the respondent-Panchayat Board, in passing the impugned order, had surrendered its judgment to the opinion of the Advocate instead of discharging its duty of coming to its own independent conclusion. When notices of these petitions were served on the respondent a counter-affidavit was filed by the President and Executive authority of the Panchayat Board, asserting the contrary position that the construction of these buildings had been planned only

with the sole idea of accommodating a particular type of the machinery in the manufacture of cars and spare parts of a particular design, and that the buildings cannot be let out to any other factory or business or for any other purposes. There was a further allegation in the counter-affidavit of the respondent, that on 17th December, 1963 the petitioner-company appealed to the Government under section 158 of the Madras Village Panchayat Act, against the demand notices issued by the Panchayat, that the Government by its order, dated 20th May, 1965 directed that the assessment on the factory buildings of the petitioner should be revised taking the annual rental value at six per cent. of the capital value of Rs. 21,74,020, and allowing for a depreciation of not less than ten per cent. of the capital value. The respondent alleged that the order of the Panchayat had become merged in the above order of the Government and that therefore the petitioner ought to have sought for the quashing of the order of the Government and on this preliminary ground alone the writ petitions ought to be dismissed.

In view of the above stand taken by the respondent-Panchayat, the petitioner filed W.P. No. 2208 of 1967 impleading the State of Madras as the third respondent and seeking for the quashing of the order of the Government, dated 20th May, 1965 by a writ of *certiorari*. It may be mentioned that this order of the Government, dated 20th May, 1965 was passed subsequent to the filing of the three writ petitions in 1965 and not earlier. In their counter-affidavit filed in W.P. No. 2208 of 1967, the Government took a different stand altogether from that of the Panchayat Board. The petitioner had approached the Government in several communications for relief against the assessment fixed by the Panchayat Board and praying the Government to exercise their power under section 158 of the Act on a reasonable annual value basis under rule 2 (*a*). The Government studied the facts and circumstances of the case and thereafter gave the direction above mentioned in the counter-affidavit of the Panchayat Board. But the Government was careful to state in their counter-affidavit, that they did not issue that direction within the forum of a statutory revision petition under section 158, but it was a direction issued by the Government under section 158 to the Panchayat Board. Therefore, for issuing such a direction, the Government was not obliged to hear the petitioner or to communicate the decision to the petitioner. However, the Government informed the petitioner that the Panchayat Board had been given necessary instructions in the matter. The Government also concluded their counter-affidavit by saying that on a question of fact the petitioner's buildings fell under rule 2 (*b*) (ii) of Notification No. 40.

At the time of the hearing of the writ petitions, learned Counsel for the petitioner submitted that in the circumstances of these cases, there has been no proper adjudication of the conflicting stands taken by the petitioner on the one hand and the Panchayat Board on the other regarding the factual nature of the building, whether it falls under rule 2 (*a*) or rule 2 (*b*) (ii) of Notification No. 40 for the purpose of assessment to property tax. In this connection reference was made to a decision of this Court reported in *General Committee, Madras Club* v. *City Municipal Council*[1], where it is observed that the buildings which are contemplated as belonging to that class (not ordinarily let) are buildings like temples, memorial buildings, etc. But a building which could be let out both for residential and business purposes would not fall under section 100 (2) (*a*) (ii) of the District Municipalities Act which corresponds to rule 2 (*b*) (ii), but would fall under section 100 (2) of the District Municipalities Act which corresponds to rule 2 (*a*) of the rules under the Madras Panchayats Act. This decision was followed in a later decision reported in *Addison Paints and Chemicals (Private) Ltd., Madras* v. *Commissioner, Corporation of Madras*[2], which also arose under the District Municipalities Act, where it was observed that the proviso to section 100 (2) of the District Municipalities Act has to be applied in lieu of section 100 (2), if the buildings are "of a class not ordinarily let" and that stress is laid on the class or type of the buildings, as ordinarily not suitable for letting out. It is urged by the learned Counsel for the petitioner that there has been no deter-

1. (1954) 1 M.L.J. 671. 2. (1962) 2 M.L.J. 440.

mination in this case, by the Panchayat Board in the appeal before it, as to whether the petitioner's factory squarely falls within the above requirements justifying the assessment either on the basis of the capital value or on the basis of the rental value, as the case may be, depending on the structure of the building and its capacity for being let or not let ordinarily. The order of the Government admittedly is not an order passed in the exercise of the statutory power of revision under section 158 of the Madras Panchayats Act. The Government themselves say that they did not give notice to the petitioner, affording an opportunity to make its representations before passing the order. They merely interfered on the request made by the petitioner for such interference, and granted some relief and communicated their decision to the Panchayat Board. In fact, it is pointed out by the learned Counsel for the petitioner that what the Government had done is to adopt in part the principle in rule 2 (*b*) (ii) by fixing the annual value at six per cent. of the capital value and in part the principle in rule 2 (*a*) to give a deduction of ten per cent. In other words, in adopting a *via media* between rules 2 (*a*) and 2 (*b*) (ii), the order of the Government must be viewed as an order passed more or less in its discretion, granting *ex gratia* some relief to reduce the impact of the burden of the property tax on the petitioner. But it is not claimed to be a statutory order. In fact, the petitioner is not satisfied with the Government's orders in the above circumstances, and would like to have a proper adjudication in the light of the relevant data available, as to whether the building is really capable of being let out as contended by it or cannot be so let out.

The attack made by the petitioner against the stand of the Panchayat Board appears to be sustainable. I have extracted the terms of the appellate order as well as the opinion given by the Advocate whom the Panchayat Board consulted. It is clear from the terms of the order that the Panchayat Board has not come to an independent conclusion on the merits of the rival contentions, but was content with adopting automatically the opinion of the Advocate whom the Panchayat Board consulted. The Advocate can give an opinion only about a point of law. But the Panchayat Board ought to have given a finding on the facts, and then applied the law to those facts. Whether it be a finding on the facts or whether it be a finding on the law applicable to the facts found, the ultimate opinion must be that of the Panchayat in its independent judgment. The Panchayat Board appears to have mechanically accepted the opinion of the lawyer whom it consulted, and did not form its own opinion. Consequently it appears to me that neither the Panchayat Board nor the Government have given a conclusive decision on the matter after considering the facts of the case and failed to act in conformity with the statutory provision for appeal in the case of the Panchayat Board, and the statutory provision for revision in the case of the Government. Therefore, the orders of the Panchayat Board making a demand for property tax, which is the subject-matter of the three writ petitions of the year 1965, and the order of the Government making more or less a direction *ex gratia* for reducing the demand the subject-matter in W.P. No. 2208 of 1967 are quashed. The matter may be considered by the Panchayat Board afresh and dealt with in the light of the law and in the light of the foregoing observations. There will be no order as to costs.

S.V.J. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE N. KRISHNASWAMY REDDY.

Lakshmiammal .. *Appellant**

v.

Samiappa Goundar and others .. *Respondents.*

Penal Code (XLV of 1860), sections 146 and 148—Offence of rioting with deadly weapons—Ingredients—"Force or violence" in section 146—Meaning—Deadly weapons—Test of.

It is clear under section 146 of the Penal Code that the gravaman of the offence of rioting is use of "force or violence" by an unlawful assembly. "Force" as defined in section 350 of the Penal Code refers to force to a person used either directly or indirectly and not to property. But the word "violence" in section 146 is not restricted to force used against person only, but extends also to force against inanimate objects.

Hence where five or more persons with the common object of causing mischief to water pipes belonging to another causes violence to them by breaking them, they will be guilty of rioting under section 146. If in so doing they are also armed with weapons like knife, hammer, crowbar and spades they would undoubtedly be guilty of the offence of rioting with deadly weapons under section 148. It cannot be urged that unless the weapons are carried for the purpose of using them as weapons of offence, they cannot be called deadly weapons. The test is not the purpose for which they were carried, but the nature of the weapons which is such that if used as weapons of offence they are likely to cause death.

Crl. A. No. 39 *of* 1965.—Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent Nos. 1 to 5 (Accused Nos. 1 to 5) of an offence under section 148, Indian Penal Code, by the Sessions Judge, Coimbatore, in C.A. No. 230 of 1964, dated 30th October, 1964, on his file (C.C. No. 213 of 1964 on the file of the Court of the Sub-Divisional Magistrate, Erode).

Crl. R. C. No. 345 *of* 1965.—Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session, Coimbatore Division at Coimbatore in C.A. No. 230 of 1964 (C.C. No. 213 of 1964 on the file of the Court of the Sub-Divisional Magistrate, Erode.)

C. K. Venkatanarasimhan, for Appellant in C.A. No. 39 of 1965.

C. Chinnaswamy for *G. M. Ramachandran* and *R. Nadanasabapathy,* for Respondents and for Petitioners in Crl.R.C. No. 345 of 1965.

The Assistant Public Prosecutor, for State.

The Court delivered the following

JUDGMENT.—The appeal and the revision arise out of the judgment in C.A. No. 230 of 1964 by the Sessions Judge, Coimbatore Division. The appellant is the complainant. The revision petitioners are the accused.

The complainant filed a private complaint against the accused before the Sub-Divisional Magistrate, Erode, alleging that the accused formed themselves into an unlawful assembly armed with deadly weapons and caused extensive damage and mischief to the water pipes laid by the complainant for taking water from a channel to his lands, punishable under sections 148 and 430, Indian Penal Code. The Sub-Divisional Magistrate convicted the accused under both the charges and sentenced each of the accused to pay a fine of Rs. 100 under section 148, Indian Penal Code,

* Crl. A. No. 39 of 1965.
Crl. R. C. No. 345 of 1965.
Crl. R. P. No. 335 of 1965.

18th September, 1967.

and a fine of Rs. 50 under section 430, Indian Penal Code. On appeal, the Sessions Judge confirmed the conviction and sentence under section 430, Indian Penal Code, but acquitted them under section 148, Indian Penal Code. Hence, the complainant preferred the appeal against the acquittal under section 148, Indian Penal Code, and the accused filed the revision petition against the order of the Sessions Judge confirming their conviction and sentence under section 430, Indian Penal Code.

So far as the revision petition is concerned, the learned Counsel for the petitioners is unable to challenge the findings of the lower Court. Both the lower Courts accepted the evidence of the prosecution witnesses and found that the accused were armed with deadly weapons and they broke the cement water pipes belonging to the complainant. The accused have not claimed a right of private defence of property ; but they denied the offence and contended that the case was foisted on them because of enmity. There is no substance in the revision petition. It is, therefore, dismissed.

As regards the appeal, the learned Counsel for the appellant contended that the learned Sessions Judge who acquitted the accused under section 148, Indian Penal Code, had misconceived the definition of rioting. There appears to be substance in his contention. The learned Sessions Judge found that the accused were armed with deadly weapons like knife, hammer, crow-bar and spades ; but, however, he held that the common object of the unlawful assembly was to break open the pipes and cause damage to P.W. 1 and not to cause threat or bodily injury to P.W. 1 and further held that though the accused were armed with weapons of the nature mentioned above, they cannot be said to be deadly weapons as they were not intended to be used as weapons of offence and so the accused have not committed the offence of rioting, much less rioting with deadly weapons. There is obviously an error in this finding. It is necessary to set out the relevant provisions in the Indian Penal Code which deal with unlawful assembly and rioting. 'Unlawful assembly' is defined under section 141, Indian Penal Code, which is as follows :

"An assembly of five or more persons is designated an "unlawful assembly" if the common object of the persons composing that assembly is—

First—to overawe by criminal force, or show of criminal force, the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the unlawful power of such public servant ; or

Second—to resist the execution of any law, or of any legal process ; or

Third—to commit any mischief or criminal trespass, or other offence ; or

Fourth—By means of criminal force, or show of criminal force, to any person to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right ;

or

Fifth—By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do ...."

In this case, the common object of the accused has been found by both the Courts to commit mischief to the water pipes which satisfies the third clause of section 141, Indian Penal Code. The conviction of the accused under section 430, Indian Penal Code (mischief) has been confirmed by the Sessions Judge. Therefore, there cannot be any doubt that the accused were the members of the unlawful assembly. 'Rioting' is defined under section 146, Indian Penal Code. Section 146, Indian Penal Code, says :

"Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting."

Punishment for rioting is provided under section 147, Indian Penal Code, extending to a period of two years' rigorous imprisonment or with fine, or with both. If a member of the unlawful assembly is guilty of rioting armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment extending upto three years, or with fine, or with both under section 148, Indian Penal Code.

It is clear under section 146, Indian Penal Code, that the gravaman of the offence of rioting is use of force or violence by an unlawful assembly. 'Violence' is not defined in the Indian Penal Code. But 'criminal force' is defined under section 350, Indian Penal Code, which is as follows :

"Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other."

'Force' refers to force to a person used either directly or indirectly causing injury, fear or annoyance to that person. This definition excludes force or violence to property. Admittedly, no force was used to any person by the accused in this case. So, the next point to be considered is, to sustain the conviction for rioting, whether violence was used.

In the Shorter Oxford English Dictionary, 'Violence' is defined as the exercise of physical force, so as to inflict injury on or damage to persons or property. When two words are used, 'force' or 'violence' in section 146, Indian Penal Code, each word will connote a different and distinct concept. While 'force' is narrowed down by the definition under section 350, Indian Penal Code, to persons, the word 'violence' is comprehensive and is used to include violence to property and other inanimate objects.

It has been held in *Samaruddi* v. *Emperor*[1] that the word 'violence' in section 146 of the Penal Code is not restricted to force used against persons only, but extends also to force against inanimate objects. Subsequently, *Venkatasubbiah* v. *Crown*[2] ; *Sankarapandia Thevar* v. *Emperor*[3] ; *Bayyan Khan* v. *Emperor*[4] ; and *Kali Das* v. *Emperor*[5] approved the decision in *Samaruddi* v. *Emperor*[1]. I respectfully agree with those decisions. It has been proved beyond reasonable doubt that the petitioners with the common object of causing mischief to the water pipes, caused violence to the pipes by breaking them. The petitioners are, therefore, guilty of rioting within the meaning of section 146, Indian Penal Code.

They were also armed with weapons like knife, hammer, crow-bar and spades. They are undoubtedly deadly weapons. The learned Sessions Judge was under a misapprehension that unless the weapons are carried for the purpose of using them as weapons of offence, they cannot be called deadly weapons. The test is not the purpose for which they were carried ; but the nature of the weapons are such that if used as weapons of offence are likely to cause death. As already stated, the weapons carried by the petitioners were weapons if they were used were likely to cause death. The petitioners will be guilty under section 148, Indian Penal Code.

For the foregoing reasons, the appeal is allowed and the conviction by the trial Court under section 148, Indian Penal Code, is restored. However, taking

1. I.L.R. 40 Cal. 367.
2. A.I.R. 1923 Mad. 603.
3. (1933) M.W.N. (Crl.) 182.
4. A.I.R. 1935 Pesh. 65 (2).
5. A.I.R. 1948 Cal. 16.

into consideration the circumstances of the case, I impose a sentence of fine of Rs. 10 on each of the petitioners, in default, each of them to undergo rigorous imprisonment for two weeks. If fine amount is realised, Rs. 50 will be paid as compensation to P.W. 1. Time for payment 10 days.

V.K. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE N. KRISHNASWAMY REDDY.

Daniel Hailey Walcott etc., .. *Appellant**

Penal Code (XLV of 1860), *sections* 30, 419, 420, 463, 464, 467 *read with* 471 *and* 470—*Offences under—Valuable security—False personation—Cheating—Forgery—Using as genuine forged document—Forgery of valuable security—Passport—Whether creates legal right—Passport Whether a valuable security.*

Defence of India Rules (1962), *rules* 26 (2), 55 (2) (b) *and* 2 (c) *read with rule* 55 (3)—*Offences under—Proof of motive of accused not necessary for offence under rule* 26 (2).

Passport Rules (1950), *rule* 3 *read with rule* 5 (v) *and* (6)—*Offence under—Entering into the country without valid passport.*

Foreigners Act (*XXXI of* 1946), *section* 5 (1) *read with section* 5 (3) *and section* 14—*Offences under—Foreigner visiting this country under a known name—Revisiting this country subsequently under a lawfully changed name—Whether commits offence under section* 5 (3).

Criminal Procedure Code (*V of* 1898), *sections* 164 *and* 537—*Judicial confession—Retraction of—Misjoinder of charges—Neither failure of justice occasioned nor prejudice caused—Conviction cannot be quashed on ground of misjoinder of charges.*

The requirements to constitute the offence of forgery are (1) the document or the part of the document must be false in fact; (2) it must have been made dishonestly or fraudulently within the meaning of the words as used in section 464, Indian Penal Code; and (3) it must have been made with one of the intents specified under section 463, Indian Penal Code. If a document is merely false, it is not enough to bring it under the offence of forgery. The main element is, the false document must have been made with a fraudulent intention. The word 'fraud' or 'fraudulently' must be understood in the general and popular sense. It involves two elements viz., (1) deceit, and (2) injury caused or likely to be caused to the person deceived or someone else in consequence of the deception. If a person by deceiving another derives any advantage from it, which he could not have had, if the truth had been known, and thereby causes injury to the body, mind or reputation of the deceived, he commits fraud. In all cases where an advantage has been obtained by the deceiver, there will be invariably be an equivalent disadvantage, in loss or risk of loss, to the deceived or to someone else. A person who deceives another and derives benefit or advantage, possibly causing injury to the deceived in body, mind or reputation and such others commits fraud, and even if no corresponding loss or disadvantage to the deceived is established, it could be inferred that if one gets benefit or advantage, someone will incur loss or disadvantage to some extent. (*Held* on facts that a part of the passport was a forged document and that the appellant fraudulently used the passport as genuine which he knew was a forged document).

Legal right in its strict sense is one which is an assertable claim, enforceable before Courts and administrative agencies; in its wider sense, a legal right has to be understood as any advantage or benefit conferred upon a person by rule of law. There are legal rights, which are not enforceable, though recognised by the law. There are legal rights recognised by the International Court, granted by

* Crl. Appeals No. 810 and 815 of 1966. 2nd August, 1967.

international law; but not enforceable; and a legal right is a capacity of asserting a secured interest rather than a claim that could be asserted in the Courts. The test of enforceability, though it may be a normal one, is not the only test for determining a legal right. A legal right is one which is either enforceable or recognised.

The holder of the passport acquires substantial privileges and it gives him a capacity to assert a rule recognised—for the outward title of his rights. He can also demand from the officials of foreign Governments that he be treated as citizen of that country which issued the passport. This right has been recognised by the law of nations and has become a rule of law. The right of a foreigner holding a valid passport to enter into this country, which is recognised under the provisions of the Indian Passport Act, is a legal right. The possession of a valid passport creates a right, recognised and enforceable, in any event, a right recognised by rule of law. If a foreigner has a legal right he can enforce, it. The passport creates a legal right as mentioned under section 30 of the Indian Penal Code and is, therefore, a valuable security.

Held, on facts that the appellant by representation and his conduct and by the production of a forged passport had committed the offence under sections 420 and 419, Indian Penal Code.

Where a person by producing before the authorities the passport, an official document, represents himself to be one person when admittedly he is not that person, he falsely impersonates that person and thereby commits an offence under rule 55 (2) (*c*) read with rule 55 (3) of the Defence of India Rules.

For an offence under rule 26 (2) of the Defence of India Rules, it is not necessary for the prosecution to prove the motive of the accused in violating the provisions.

Held, on facts, the appellant had committed offence under this provision as well as rule 3 read with rules 5 (*v*) and 6 of Indian Passport Rules, by entering without a valid passport.

If a foreigner enters into this country and remains in this country, even for a short period, with a known name and he subsequently assumes or uses another name for any purpose without the permission of the Central Government, he will come within section 5 (3). If a foreigner visits this country with a known name and returns to his country and changes his name in his country according to the law and procedure of that country and uses that assumed name, it cannot be said that he had assumed or used the name while he was in this country. What is contemplated under section 5 is that a foreigner shall not change or use any other name other than the name by which he was known previously while he was in this country without the permission of the Central Government. If a foreigner has lawfully changed his name and comes to this country, it cannot be said that he is committing an offence under section 5 (3).

As neither material injury was caused to the appellant nor a failure of justice occasioned conviction cannot be quashed on the ground of misjoinder of charges.

Held, on facts that the appelant must have known the consequence of giving a judicial confession even under threat and that sufficient warnings were giver by the Magistrate who recorded the confession, that if the appellant chose to give the confession, it would be used against him. It was held that the confession given by the appellant was voluntary and true.

Appeal against the Judgments of the Court of Session of the Madras Division at Madras and passed respectively cases. Nos. 10 and 11 of the Calendar for 1966 dated 7th September, 1966.

K. Ramaswami, for Appellant in Crl. A. No. 810 of 1966.

S. Krishnamurthi, for Appellant in Crl. A. No. 815 of 1966.

V.P. Raman, Special Public Prosecutor on behalf of the State in both the Appeals.

The Court made the following

ORDER.—The appellants in both these appeals, Daniel Hailey Walcott and Jean Claude Donze were separately tried on various charges by the Sessions Judge, Madras. I propose to deal with these appeals in this Judgment; but separately, as the points raised in both the appeals are the same though the facts are slightly different.

C.A. No. 810 *of* 1966.—The appellant Daniel Hailey Walcott was charged under ten counts, of which he was convicted on counts No. 1 and 3 to 10 and was sentenced to various terms of imprisonment, the maximum being R.I. of five years, the sentences to run concurrently, by the Sessions Judge, Madras.

The facts of the case, which are almost admitted, are briefly as follows: The appellant is a national of the United States of America. He landed at Meenambakkam Aerodrome, Madras, at about 6-30 P.M. on 31st December, 1965, from Air Ceylon Flight A E-207 from Colombo with the British passport in the name of one B.P.C. Comyn, a British subject. It appears that he had visited this country on prior occasions. A brief history of those visits may be necessary to be noted for appreciating one of the charges under which he had been convicted.

On 15th January, 1962, the appellant landed at Santa Cruz Aerodrome, Bombay, with a passport describing himself as Daniel Hailey Walcott, a United States National. On 23rd January, 1962, he left for London. It appears, during that visit, before he left the country, he represented to the officials of Air India, New Delhi, that he was the President of the Trans Atlantic Airlines Ltd., and in that capacity negotiated with them in respect of charter flights for transport of goods between India and Afganisthan, and subsequently an agreement was entered into between the Appellant describing himself as Daniel Hailey Walcott and Air India in relation to charter flights. In pursuance of the agreement, the appellant employed one Shri Nurcharan (P.W. 10) as an aircraft mechanic between February, and September, 1962.

The appellant came back to India and landed at Palam Air port, New Delhi on 8th March, 1962, describing himself as Daniel Hailey Walcott, Jr., with a residential permit valid till 25th April, 1962. From 13th April, 1962 for about 5 or 6 months, the appellant stayed with his wife in the Ashoka Hotel, New Delhi, registering himself as Daniel Hailey Walcott, a United State national. While he was staying in Ashoka Hotel, the Delhi Police registered a case against him under the Indian Arms Act and filed a charge-sheet before the Sub-Divisional Magistrate, New Delhi. In connection with that case, the appellant was detained in the Central Jail, New Delhi, from 25th September, 1962 to 1st December, 1962. He was subsequently released on bail and he left India. The Assistant Collector of Customs, New Delhi, filed a complaint on 22nd February, 1963, against the appellant under the Sea Customs Act and the Import and Export Control Act of 1947. On 24th February, 1963, the appellant landed at the Palam Air port and left India on 2nd March, 1963 and he returned in April to New Delhi. The appellant was convicted by the Sub-Divisional Magistrate, New Delhi, on the complaint given by the Assistant Collector of Customs and sentenced to R.I. for six months and to pay a fine of Rs. 2,000. He was detained in the Central Jail from 23rd August, 1963 till 11th September, 1963, when he was released by the order of the appellate Court which reduced the sentence to the period already undergone and increased the fine amount. On 23rd September, 1963, he left New Delhi. After he left, it appears that the Delhi Police registered another complaint against him and obtained a non-bailable warrant to arrest the appellant. As the appellant absconded from the country, a proclamation was issued on 20th October, 1964, declaring the appellant as a proclaimed offender. Another case was subsequently registered under the provisions

of the 'Foreigners' Registration Act and the Defence of India Act suspecting the appellant as one of the aliens who entered this country by using a forged passport. A warrant was issued by the Additional Chief Presidency Magistrate, Bombay on 19th March, 1965, to arrest the appellant in England and produce him before the Sub Divisional Magistrate, New Delhi. Of course, the appellant denied knowledge of the two cases registered against him.

In this state of affairs, the appellant landed at Meenambakkam Air port on 31st December, 1965, with the British Passport in the name of Barry Philip Charles Comyn as already noted. After landing, the appellant produced at the Health Counter a declaration form of origin and health standing in the name of one B.P.C. Comyn, a British subject. At the Passport Security counter, the appellant produced before P.W. 23 the Sub-Inspector of Police attached to the Port Registration Office, a British Passport, Exhibit P-40, and a disembarkation card, Exhibit P-56, both standing in the name of B.P.C.Comyn. After passing the Passport Security Counter, the appellant proceeded to the Customs Counter and produced before the Customs Officer the passport and represented that he was a tourist. The officials passed him out as they believed that he was a tourist holding a British passport.

The appellant went to Oceanic Hotel, Madras, with another foreigner at about 8-45 P.M. the same day and obtained accommodation describing himself as B.P.C. Comyn, a British national, Engineer by profession, permanently residing at N. 14-A, Mrlborough Place, London, and having a passport bearing No. 991143. This description was given in Exhibit P-77, the Arrival register, by the appellant in his own handwriting. On the next day, the appellant and his companion left the hotel for Bombay. While he was staying in the West End Hotel, Bombay, along with his companion, he was arrested by D. W. Crawford, Deputy Superintendent of Police, Central Bureau of Investigation on suspicion that he might be Walcott, wanted in two cases. His finger prints were taken and they were compared with the finger print slip of Daniel Hailey Walcott which was taken by the Delhi Police in connection with the earlier conviction and kept at the Police Office in Delhi. On a comparison of the finger print slip and the finger prints taken from the appellant in Bombay by the Finger Print Expert, it was found that they tallied. The passport, Exhibit P-40, was seized from the appellant at Bombay. As it was found that he was in possession of passport in the name of B.P.C. Comyn, the police suspected that he had come to this country with a forged passport in order to avoid the detection of his identity as Daniel Hailey Walcott. What happened subsequently, in the course of the investigation, is not material for the purpose of this case excepting that he made a judicial confession in the course of the investigation before the Presidency Magistrate of Greater Bombay which would be adverted to later in dealing with his confession.

The prosecution claimed that the British Passport, Exhibit P-40, produced by the appellant was a forged one, that the appellant was not a British subject and his name was not B.P.C. Comyn and that he used the forged passport fraudulently knowing that it was a forged document.

I propose to deal with charge No. 10 first, which is the main charge, the other charges being either allied or subsidiary. This charge deals with the appellant having using forged document, a valuable security, fraudulently, knowing it to be false to gain entry to this country. In respect of this charge, the following facts are proved:

On 19th November, 1965, an application dated 17th November, 1965, with a passport photograph of the appellant annexed thereto was received at the Passport Office, London, praying for the issue of a Passport to Barry Philip Charles Comyn, an Engineer, born in England on 28th June, 1934. It was attested by Harry F. Johnson, 14, John Street, London, W.C. 1. In pursuance of that, a British Passport, Exhibit P-40 was issued to the said Comyn on 22nd November, 1965. It was found that a man bearing the name Barry Philip Charles Comyn, an Engineer, was not residing in the address given in the application but a man bearing that name who

was born in London on 28th June, 1934 dated in 1940 when he was six years old, during war operations. It was also found that no solicitor by name Harry F. Johnson lived in the address given in the application.

The appellant admitted that his name is Daniel Hailey Walcott and that he is a national of United States of America. He landed in India in January, 1962, as an American National under the name of Daniel Hailey Walcott and even during his subsequent visit to India, he came in the name Daniel Hailey Walcott. He also admitted that he landed at Meenambakkam Airport on 31st December, 1965 with the British Passport Exhibit P-40 and produced it before the officials and that he entered his name in the register maintained in the Oceanic Hotel as B.P.C. Comyn, a British subject. He added that the passport was arranged through a professional expert forger in London. The appellant contacted the forger who suggested that a passport could be had in the name of Barry Philips Charles Comyn and on his advice a paper containing the signature of Barry Philips Charles Comyn written by the appellant in his own handwriting was given and the forger subsequently obtained the passport and gave it to him. That the appellant obtained the British passport in the name of B.P.C. Comyn is not disputed and that he used the passport for entering into this country is also not disputed. In this context, it is necessary to consider the judicial confession made by the appellant, the relevant portion of which is as follows :

> "I am Daniel Hailey Walcott American National aged 38. I was born at Dalhart, Texas, U.S.A., on 26th November, 1927. I was educated in the University of Virginia in U.S.A. from which I hold Bachelor of Science Degree. I believe it is necessary for me to make a statement at this time of the events leading to the commission of the following acts..................
>
> We flew to Colombo, Ceylon from Paris and took the Ceylon Airways to Madras Arriving on 31st December, 1965 evening. I was using a false British passport under the name of Barry Philips Charles Comyn and Mr. Donze was using false British passport under the name of Stephen Thomas Lamb. These passports were obtained from the Foreign Office, London by making an application with certificates of a deceased person, using our photographs. We flew immediately to Bombay after spending the night in Madras and........"

The appellant had retracted from the judicial confession and stated that he gave the confession under threat, pressure and coercion. The learned Counsel appearing for the appellant contended that he was kept for a long time in the custody of the police and that in those circumstances, it should be presumed that the confession must have been given only under pressure. I do not think there is substance in this contention. The appellant appears to be an intelligent and experienced man. He must have known the consequence of giving a judicial confession even under threat. Sufficient warnings were given by the Magistrate who recorded the confession that if the appellant chose to give the confession, it would be used against him. The appellant has given a lengthy confessional statement in respect of matters not relevant to this case. A perusal of the confessional statement gives an impression that it is not only true but also voluntary. Besides this, it is very significant to note that in an affidavit filed by the appellant for a writ of *habeas corpus*, he stated that he might be permitted to make a confessional statement in the presence of a Magistrate. In the committal Court, he admitted that he made the judicial confession. It was only in the Sessions Court he retracted. For all the reasons mentioned above, I am convinced that the Judicial confession made by the appellant was voluntary and true.

From the facts stated above, it is clear that the applicant landed at Meenambakkam Aerodrome on 31st December, 1965 with the British Passport in the name of B.P.C. Comyn, that he obtained a passport in the name of Comyn with

the help of a forger, that the signature of Comyn in the application attached to the passport was in the handwriting of the appellant, that the passport used by him in gaining entry into this country is a false document and that the appellant was known at all material times as Daniel Hailey Walcott.

The learned Counsel appearing for the appellant contended that even assuming the facts to be true, it is not proved by the prosecution that the passport is a forged document as defined in section 463 Indian Penal Code and that the appellant used the document fraudulently knowing it to be forged. To appreciate the contentions of the learned Counsel in respect of this charge, it may be necessary to note the relevant sections of the Indian Penal Code. 'Forgery' as defined in section 463 Indian Penal Code is as follows:—

"Whoever makes any false document or part of a document with intent to cause damage or injury......... or with intent to commit fraud or that fraud may be committed, commits forgery."

Making a false document is defined in section 464, Indian Penal Code which runs as follows :

"A person is said to make a false document—

First—Who dishonestly or fraudulently makes signs, scales or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was made, signed, scaled or executed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed or executed, or at a time at which he knows that it was not made, signed, sealed or executed."

The other two provisions of the section are omitted as they are not relevant for the purpose of the discussion in this case.

'Forged document' is defined under section 470, Indian Penal Code. A false document made wholly or in part by forgery is designated 'a forged document'. The requirements to constitute the offence of forgery may be broadly stated as follows: (1) The document or the part of the document must be false in fact; (2) It must have been made dishonestly or fraudulently within the meaning of the words as used in section 464 Indian Penal Code and (3) It must have been made with one of the intents specified under section 463, Indian Penal Code.

It is contended that the passport Exhibit P-40 was issued by the competent authority and the document cannot be said to be forged though the particulars contained in page 2 of the passport Exhibit P-40 (*a*) under the false signature of B.P.C. Comyn may be false, and it is further contended that those particulars cannot be said to be a part of the document. Hence, it becomes necessary to consider whether the particulars contained in page 2 of Exhibit P-40 constitute a part of the document. It appears that in the United Kingdom, to obtain a passport, the applicant must submit what is called a "person description slip" along with the application showing particulars relating to his profession, place and date of birth, country of residence, height, colour of hair and eyes and any other special mark and has to be signed by the applicant and this will be pasted to page 2 of the passport. This slip after it is pasted to the passport, undoubtedly becomes a part of the document, without which the passport cannot be recognised by the authorities concerned. Instead of the passport authorities writing the particulars themselves, the slip prepared by the applicant is placed in the passport as part and parcel thereof. The learned Counsel had to concede that Exhibit P-40 (*a*) namely, page 2 of the passport might be a part of the document, but contends it was not made with intent to commit fraud or that fraud might be committed. It is true that if a document is merely false, it is not enough to bring it under the offence of forgery. The main element is, that false document must have been made with a fraudulent intention. There cannot be

any doubt that the part of the document *viz.*, page 2 in the passport is false. But the question is whether it was made with fraudulent intention. "Fraudulently" is defined in section 25 of the Indian Penal Code. It says that a person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise. This definition does not give much help as it is used tautologically. The word 'fraud' or 'fraudulently' must be understood in the general and popular sense. It involves two elements, namely (1) deceit; and (ii) injury caused or likely to be caused to the person deceived or someone else in consequence of the deception. If a person by deceiving another derives any advantage from it, which he could not have had, if the truth had been known, and thereby causes injury to the body, mind or reputation of the deceived, he commits fraud. In all cases where an advantage has been obtained by the deceiver, there will be invariably an equivalent disadvantage in loss or risk of loss to the deceived or to someone else.

In *Dr. Vimla* v. *Delhi Administration*[1], the case law on this subject was fully discussed and the principles has been laid down in the following terms :

The expression 'defraud' involves two elements, namely, deceit, and injury to the person deceived. Injury is something other than economic loss *i.e.*, deprivation of property, whether movable or immovable, or of money, and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is non-economic or non-pecuniary loss. A benefit or advantage to the deceiver will almost always cause loss or detriment to the deceived. Even in those rare cases where there is any benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied. Non-economic advantages to the deceiver or non-economic loss to the deceived need not co-exist.

Sir James Stephen, in his 'History of the Criminal Law of England, vol. II, page 121, observes—which has been quoted in *Kotamraju Venkatrayadu* v. *Emperor*[2] the Full Bench decision of this Court, subsequently followed and approved by the Supreme Court in *Dr. Vimla* v. *Delhi Administration*[1].

> "Whenever the words 'fraud' or 'Intent to defraud,' or 'fraudulently' occur in the definition of a crime, two elements atleast are essential to the commission of the crime; namely, first, deceit or an intention to deceive, or in some cases, mere secrecy; and secondly; either actual injury, or possible injury, or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or "secrecy". "This intent," he adds, "is very seldom the only, or the principal, intention entertained by the fraudulent person, whose principal object in nearly every case is his own advantage ....
> A practically conclusive test of the fraudulent character of a deception for criminal purposes is this : Did the author of the deceit derive any advantage from it which could not have been had if the truth had been known ? If so, it is hardly possible that the advantage should not have had an equivalent in loss or risk of loss to some one else, and, if so, there was fraud."

It is, therefore, clear that a person who deceives another and derives benefit or advantage, possibly causing injury to the deceived in body, mind or reputation and such others commits fraud and that even if no corresponding loss or disadvantage to the deceived is established, it could be inferred that if one gets benefit or advantage, some one will incur loss or disadvantage to some extent. Applying this principle in the present case, there cannot be any doubt that Ex. P-40 (*a*), page 2of the passport, a part of the passport is a false document made, in order that fraud might be committed. The maker must have known that what was made was false and that he intended that the authorities concerned could be deceived by making such authorities believe the document to be true when it was false and allow the holder of the document to enter the country to which he was bound by virtue of the passport. The appellant admitted in his statement under section 342, Criminal Pro-

1. (1963) M.L.J. (Cri.) 560: (1963) 2 S.C.J. 559: (1963) 2 S.C.R. (Supp) 585: A.I.R. 1963. S.C. 1572.
2. I.L.R. (1905) 28 Mad. 90 at 968.

cedure Code, that it was he who put the signature of Comyn in Ex. P-40 (*a*) a part of the passport. I, therefore, find that a part of the passport, namely, page 2 of Ex. P-40 is a forged document.

It was contended, however, by the learned Counsel for the appellant that at the worst it could be said that the appellant furnished false particulars in the application and forged the signature of one Comyn in that application but it cannot be said the appellant made the part of the passport. I do not think there is any substance in this contention. It is not the application that is the subject matter of this case, but the passport. To put it short, page 2 of the passport is made by the appellant and the signature of B.P.C. Comyn therein is admittedly forged.

The appellant has been convicted for having used the forged document fraudulently. He admitted that he was in possession of the forged British passport Ex. P. 40 when he landed at Meenambakkam Airport. He produced the passport to authorities concerned. By producing the forged passport, he made the authorities believe that it was genuine and thereby deceived and obtained the advantage of gaining entry into this country. The appellant by deception had caused injury to mind and reputation of the officers concerned, in that if the officers had known that it was a forged document at the time he produced, they would not have allowed the appellant to enter and to that extent, a detriment was caused. There is no doubt that the appellant fraudulently used Ex. P. 40 the passport as genuine which he knew was a forged document.

The next important question to be considered is whether Ex. P. 40 the passport is a valuable security, since the appellant was convicted under section 471 read with 467 Indian Penal Code, section 467 Indian Penal Code is a penal section in respect of forgery of valuable security. Elaborate arguments were advanced by the learned Counsel appearing on both sides and, therefore, it may be necessary to deal with this point with the consideration.

" Valuable security " is defined in section 30 of the Indian Penal Code.

> " The words ' valuable security ' denote a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished or released, or whereby by any person acknowledges that he lies under legal liability, or has not a certain legal right. "

In view of the definition, we are now concerned in this case whether the passport created a legal right. We have to first consider what a legal right is before dealing with the nature of the passport and whether it creates a legal right.

Legal right is a difficult concept. It is not defined. It is, therefore, necessary to note carefully what the eminent jurists have said about this concept of legal right. Roscoe Pound in his jurisprudence—Volume IV, Chapter 21, page 70, stated as follows:

> "..........by the end of the last century a legal right had come to be defined as a secured interest, or as a capacity of asserting a secured interest, or as a claim that could be asserted in the Courts."

Roscoe Pound prefers to follow the English analytical jurists and thinks or legal right lies in the capacity of assertion rather than of an assertable claim. In the same page, it is stated :

> " The capacities of asserting it (legal right) before Courts and administrative agencies by which the interest is given efficacy are some conferred and some recognized. "

At pages 70 and 71, it is stated :

> " The capacities of creating, divesting or altering legal rights in the stricter sense or of creating liabilities, as means of securing recognized interests (legal powers) are some conferred and some recognised .... The exemptions on certain occasions from liability for what would otherwise be infringements of

legal rights, are sometimes conferred, as in case of emergency privileges ...... in all of these juristic conceptions through which recognised and delimited interests are secured, there is a capacity of asserting them before Courts and administrative agencies."

At pages 74 and 75 Roscoe Pound again says :

"I should put the juristic conceptions by which legally recognised and delimited interests are secured as legal rights (in the stricter sense) powers, liberties, privileges, duties, and liabilities."

Salmond on Jurisprudence—Twelfth Edition—at page 224 states that a legal right in the generic sense may be defined as any advantage or benefit conferred upon a person by a rule of law. Again at page 233 under the head note "The kinds of legal rights", it is stated :

"A perfect right is one which corresponds to a perfect duty, and a perfect duty in one which is not merely recognised by the law, but *enforced* .... In all ordinary cases, if the law will recognise a right at all it will enforce it. In all fully developed legal systems, however, there are rights and duties which, though undoubtedly recognised by the law, yet fall short of this typical and perfect form .... Examples of such imperfect legal rights are .... claims against foreign states or sovereigns, as for interest due on foreign bonds .... No action will lie for their maintenance ; *yet they are, for all that, legal rights and legal duties, for they receive recognition from the law.*"

C. W. Paton in his Text Book of Jurisprudence—Third Edition—at page 250, states as follows :

"........ the characteristic mark of a legal right is its recognition by a legal system .... Enforceability by legal process has, therefore, sometimes been said to be the *sine qua non* of a legal right .... *there are certain rights, sometimes called imperfect rights, which the law recognizes but will not enforce directly.*"

At page 251, he again says :

"........ in some systems Courts of justice do not control an adequate machinery for enforcement. Thus in international law there is no power in the Court to enforce its decree. Hence, ultimately, the answer to the question whether the essence of a legal right lies in its enforceability will depend on our definition of law. Dicey distinguished between constitutional conventions and laws, the test of the latter being that they will be enforced by the Courts, whereas the conventions will not. *Many constitutional lawyers point out, however, that if we apply rigorously the test of enforcement in a Court of law we are left with too narrow a view of constitutional law .... Because of the difficulties which sometimes arise in the enforcement of particular rights, it is better to define a legal right in terms of recognition and protection by the legal order.* This does not unduly narrow the meaning of legal right. Thus an international Court would recognise any rights granted by international law and would protect them so far as it could, even although there was no machinery for direct enforcement. The element of enforceability is important in questions of jurisdiction and private international law."

From the statements made by the jurists noted above, the following principles can be deduced broadly to understand what a 'legal right' : (1) Legal right in its strict sense is one which is an assertable claim, enforceable before Courts and administrative agencies; (2) In its wider sense, a legal right has to be understood as any advantage or benefit conferred upon a person by a rule of law ; (3) There are legal rights, which are not enforceable, though recognised by the law; (4) There are rights recognised by the International Court, granted by international law ; but not enforceable ; and (5) A legal right is a capacity of asserting a secured interest rather than a claim that could be asserted in the Courts.

It is, therefore, clear that the test of enforceability, though it may be a normal one, is not the only test for determining a legal right. A legal right may be one

recognised by rule of law, either by Municipal Law or International Law, without the capacity of being enforced. A legal right may be asserted even before administrative agencies. It includes the liberty of freedom from penalty. In short, it can be said that a legal right is one which is either enforceable or recognised.

Bearing these principles in mind, we have to consider whether the British passport Ex. P-40 obtained by the appellant created any legal right to bring it within the definition of 'valuable security' under section 30 Indian Penal Code. It is necessary to know the implication of a passport.

A British passport is described as follows by Lord Alverstone, C.J., in *Rex* v. *Brailsford*[1] which is oft quoted :

> "It is a document issued in the name of the Sovereign on the responsibility of Minister of the Crown to a named individual, intended to be presented to the Governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries."

A British passport as Indian passport by its terms requests and requires all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford him every assistance and protection of which he may stand in need.

Lord Jowitt, L.C. in *Joyce* v. *Director of Public Prosecutions*[2], in his illustrious speech in respect of the characteristics of a British passport observed as follows :

> "........the possession of a passport by one who is not a British subject gives him rights and imposes upon the sovereign obligations which would otherwise not be given or imposed."

At page 370, he says :

> "To me, my Lords, it appears that the Crown in issuing a passport is assuming an onerous burden, and the holder of the passport is acquiring substantial previleges. A well-known writer or international law has said (*See* Oppenheimr, International Law, 5th Ed., Vol. I, page 546) that by a universally recognized customary rule of the law of nationals every state holds the right of protection over its citizens abroad. This rule thus recognized may be asserted by the holder of a passport which is for him the outward title of his rights. It is true that the measure in which the state will exercise its right lies in its discretion. But with the issue of the passport the first step is taken. Armed with that document the holder may demand from the State's representatives abroad and from the officials of foreign Governments that he be treated as a British subject, and even in the territory of a hostile state may claim the intervention of the protecting power."

It is, therefore, clear from this speech with which I respectifully agree that the holder of the passport acquires substantial privileges and that it gives him a capacity to assert—a rule recognised—for the outward title of his rights. He can also demand from the officials of foreign governments that he be treated as citizen of that country which issued the passport. This right has been recognized by the law of nations and has become a rule of law.

Apart from this, in this country a law has been made, taking power to require passports of persons entering India. Indian Passport Act (XXXIV of 1920) was passed in 1920. Section 3 of the said Act provides to make rules prohibiting entry into India of any person who is not in his possession a passport issued to him. In exercise of the powers conferred under section 3 of the said Act, the Central Government made rules. Under rule 3, therfore, no person proceeding from any place outside India shall enter, or attempt to enter, India by water, land or air unless he is in possession of a valid passport conforming to the conditions prescribed in rule 5 thereof. Under section 4 of the said Act, any person who contravenes the rules made in section 3 can be arrested and under rule 6 of the rules, such a person can be punish-

1. (1905) 2 K.B. 730 at 745.
2. L.R. (1946) A.C. 347 at 369.

ed with imprisonment for a term which may extend to three months or with fine or with both. Under section 5 of the Act, the Central Government is authorised by general or special order to direct the removal or any such person from India."

These provisions make it abundantly clear that possession of a passport is a necessary requisite for a person leaving India.

But, however, the main question involved in this case is as to the nature and the characteristic of a passport issued by a foreign country to its national to enter this country. It is, therefore, necessary to note the relevant provisions of the Indian Passport Act and the rules framed thereunder.

'Passport' is defined under section 2 of the Act as one for the time being in force issued or renewed by the prescribed authority and satisfying the conditions prescribed relating to the class of passports to which it belongs. The conditions of a valid passport are mentioned in rule 5 of the Rules of which the main condition is that it shall have been issued or renewed by or on behalf of the Government of the country of which the person to whom it relates is a national and shall be within the period of the validity. Rule 3 of the Rules which is very important for the discus ion herein is as follows:

> "Save as provided in rule 4, no person proceeding from any place outside India shall enter, or attempt to enter, India by water, land or air:—
>
> (*a*) unless he is in possession of a valid passport conforming to the conditions prescribed in rule 5, and.........."

Under rule 4, certain classes of persons are exempted from the provisions of rule 3.

The Indian Passport Act with the rules framed thereunder, therefore, recognizes the right of a foreigner holding a valid passport to enter into this country. When such right is recognised there is correspondingly the duty of the authorities exercising the powers under this Act to allow a person holding a valid passport to enter this country unless otherwise such person is disqualified in the view of the authorities. Thus, in my opinion, this right which is recognized under the provisions of the Indian Passport Act, is a legal right.

The learned Counsel for the appellant strenuously argued that a passport does not create an enforceable legal right as only a request is made to the foreign countries by the country which issues the passport to its national to permit him to travel without let or hindrance and to give him necessary protection. This, the Counsel says is by virtue of international convention and does not have the force of rule of law. The learned Counsel in support of his contention relied upon a passage in the British Digest of International Law published by Stevens & Sons Phase 1, Volume 6 at page 9 which is as follows:

> "An alien, it has been judicially stated by the Privy Council in *Musgrove* v. *Chun Teeong Toy*[1], has in English law no enforceable right to enter British territory. This principle is quite independent of any general legislation in force whereby the entry of aliens is regulated."

This passage is not at all helpful, in my opinion, to support the contention of the learned Counsel. The second sentence in the passage makes it clear that the principle mentioned in the first sentence does not apply in cases where a law is made regulating the entry of aliens. We have in this country a law made (Indian Passport Act, 1920) regulating the entry of persons into India and also the Foreigners Act (XXXI of 1946) which, I will advert to presently, which provides for the exercise of powers by the Central Government in respect of the entry of foreigners into India, their presence therein and their departure therefrom. Thus, we have legislation in force in this country in respect of the entry of foreigners into India

1. L.R. (1891) A.C. 272.

The principle quoted in the above passage is based upon the decision in *Musgrove* v. *Chun Teeong Toy*[1]. To appreciate this principle, it is necessary to know under what circumstances the principle was laid down and whether this principle is absolute and unconditional.

The facts in that case are these :

The plaintiff Chun Teeong Toy, a Chinese national was refused entry on his arrival in the port of Melbourne by a British ship. The plaintiff contended that he and the master of the vessel offered to pay £10 to the Collector of Customs as provided by section 3 of the Chinese Act of 1881. But the Collector of Customs refused to receive the said £10 and to allow the plaintiff to land in Victoria. It appears, by section 2 of the Chinese Act, 1881, if any vessel which had on board a greater number of immigrants than in the proportion of one such immigrant to every hundred tons of the tonnage of such vessel, the owner, master, or charterer of such vessel should be liable to a penalty of £ 100 or each immigrant so carried in excess of the foregoing limitation. By section 3 of the same Act it was provided that any immigrant arriving from parts beyond Victoria shall be permitted to land from any vessel at any port or place in Victoria, provided the master of the vessel shall pay to the Collector the sum of £10 for every such immigrant. When the vessel arrived at Melbourne, she carried more than the number limited by section 2 of the Chinese Act which was unlawful. The question, therefore, arose for decision whether the Colonial Government had the power to prevent the plaintiff, a Chinese immigrant from landing on the shores of the colony under the circumstances of the case and whether an action is maintainable by him in British Courts. In answering this question, it is observed at page 282 thus :

"...... their Lordships would observe that the fact appearing on the record raise, quite apart from the statutes referred to, a grave question as to the plaintiff's right to maintain the action. He can only do so if he can establish that an alien has a legal right, enforceable by action, to enter British territory. No authority exists for the proposition that an alien has any such right. Circumstances may occur in which the refusal to permit an alien to land might be such an interference with international comity as would properly give rise to diplomatic remonstrance from the country of which he was a native, but it is quite another thing to assert that an alien excluded from any part of Her Majesty's dominions by the executive government there, can maintain an action in a British Court, and raise such questions as were argued before their Lordships on the present appeal—whether the proper officer for giving or refusing access to the country has been duly authorised by his own colonial government, whether the colonial government has received sufficient delegated authority from the Crown to exercise the authority which the Crown had a right to exercise through the colonial government if properly communicated to it, and whether the Crown has the right without Parliamentary authority to exclude an alien. Their Lordships cannot assent to the proposition that an alien refused permission to enter British territory can, in an action in a British Court, compel the decision of such matters as these, involving delicate and difficult constitutional questions affecting the respective rights of the Crown and Parliament, and the relations of this country to her self-governing colonies. *When once it is admitted that there is no absolute and unqualified right of action on behalf of an alien refused admission to British territory*, their Lordships are of opinion that it would be impossible upon the (facts which the demurrer admits) for an alien to maintain an action ".

To my mind, a careful reading of this passage does not fully support the view that an alien cannot under no circumstance maintain an action in respect of refusal of entry. What their Lordships have said was that an action of the nature involving delicate questions of the constitutional rights could not be brought in an action by an alien and such right of action is not absolute and unqualified. From the observa-

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1. L.R. (1891) A.C. 272.

tions made by their Lordships, it is clear that an action by an alien is not completely excluded.

Under our Constitution, the fundamental rights provided under Articles 14, 21, 25 and 31 are open to any person irrespective of the fact whether he is a citizen of India or not. All civilized countries recognise and protect these basic human freedoms. The infringment of the rights mentioned above will undoubtedly give a cause of action even to foreigners who are not citizens of India, but the question here is whether an alien can move these Courts if entry is refused in spite of his possessing a valid passport. Under the provisions of the Foreigners Act, the Commonwealth citizen in entitled to certain civic rights and protection. Section 3 (A) of the Foreigners Act provides power to exempt the citizens of Commonwealth countries and other persons from the application of the Foreigners Act in certain cases.

By virtue of the powers conferred under section 3 (A) of the Foreigners Act, Foreigners (Exemption) Order, 1957, was passed by the Central Government exempting the United Kingdom and other countries mentioned in para. 2 of the said order from the operation of the provisions of the Foreigners Act excepting to the extent mentioned in paragraph 3 of the order. It is true that a discretion is left with the Central Government to allow or refuse entry of a foreigner into this country; but so far as a British subject is concerned, it can refuse entry under the circumstances mentioned in paragraph 3 of the order. Otherwise, it is clear to my mind that if a British subject holds a valid passport, he has got a right to demand entry into this country. He has a freedom from penalty and can claim immunity from the penalty. It confers on him a right of immunity from punishment. If a British subject knowing the Municipal law of this country, attracted by the exemptions and concessions under the provisions of the Foreigners Exemption Order, obtains a valid passport and comes to this country as a tourist without any disqualification liable for the refusal of entry, can the authorities refuse permission to such a person to enter, without valid reasons ? If entry is refused by an officer arbitrarily abusing his power, cannot the British subject get redress by moving the civil Courts or at least through the administrative agencies ? In my opinion, he has certainly got a remedy by asserting his claim to enter into this country by virtue of a valid passport given to him if he has no other disqualification. Otherwise, it would be unfair and unjust to refuse entry to the British subject who has been assured under the Municipal law of this country that he will be allowed to enter if he has a valid passport issued by that country of which he is the national and fulfils the conditions as required under the law. I am therefore, of the opinion, the possession of a valid passport creates a right, recognised and enforceable, in any event, a right recognised by rule of law.

In *Md. Soleman* v. *State*[1], in considering the rights of a foreigner to move civil Courts under the Constitution, it was observed by the Division Bench consisting of Mukharji and Laik, JJ., as follows :

> "..........even if a foreigner has no *locus standi* to claim a fundamental right under Article 19 he can still have a *locus standi*, to claim a legal right, if he has any, and attempt to enforce it by a writ or order or direction under Article 226."

I respectfully agree with the view expressed in the above decision. If a foreigner has a legal right, he can enforce it.

In a recent decision of the Supreme Court in *Satwant Singh Sawhney* v. *D. Ramarathnam*[2], Subba Rao, C.J., in the majority Judgment, in considering whether an Indian citizen has got a fundamental right to travel abroad and whether a passport is a condition requisite for such travel emphasized the importance of passport in the following terms :

1. A.I.R. 1965 Cal. 312.
2. (1968) M.L.J. (Cr.) 30: (1968) 1 S.C.J. 178.

"..........a passport, whether in England or in the United States of America serve diverse purposes; it is a request for protection, it is a document of identity, it is a *prima facie* evidence of nationality—in modern times, it not only controls exit from the State to which one belongs, but without it, with a few exceptions, it is not possible to enter another State. It has become a condition for free travel."

Of course, in this decision the legal effect of a passport was not considered and it was left open. It is clear from the observations made by the Supreme Court that the passport is a very valuable document, in that it establishes the identity of the person who holds it. It is a valuable piece of evidence to protect himself from any prosecution. It is a *prima facie* evidence that he is the national of the country which issued the passport in his favour.

The passport Exhibit P-40 in this case creates legal right as mentioned under section 30 of the Indian Penal Code and it is, therefore, a valuable security. The conviction of the appellant under this charge by the lower Court is, therefore, correct and is confirmed.

Charge No. 3 : The appellant has been convicted under rule 55 (2) (*b*) read with Rule 55 (3) of the Defence of India Rules and sentenced to rigorous imprisonment for three years. Rule 55 (2) (*b*) is as follows :

"No person shall use or have in his possession any forged or altered official document or any document so nearly resembling an official document as to be calculated to deceive."

Rule 55 (3) provides punishment extending upto five years or with fine or with both for contravention of any of the provisions of the rule. This rule is substantially the reproduction of section 471, Indian Penal Code. I have already found that the appellant used Exhibit P-40 passport, a forged document, under Charge No. 10. The conviction under this charge is a correct and confirmed.

Charge No. 4.—It is under rule 55 (2) (*c*) read with rule 55 (3) of the Defence of India Rules. Rule 55 (2) (*c*) is as follows :

"No person shall personate or falsely represent himself to be, or not to be a person to whom an official document relates or to whom an official document or any secret official code word or password has been duly issued or communicated."

It is clear from the facts of this case that the appellant by producing before the authorities the passport, an official document represented himself to be one Comyn when admittedly he was not Comyn but Daniel Hailey Walcott. The appellant thereby falsely impersonated one Comyn. The appellant has also admitted in his judicial confession and his statement under section 342, Criminal Procedure Code, that he was in possession of the passport issued in the name of Comyn and he was passed out as Comyn on the production of the passport. The conviction by the lower Court under this charge is also correct and is hereby confirmed.

Charge No. 5.—It is a similar charge as that of charge No. 4; but this was in respect of the appellant having personated and falsely represented before the receptionist of the Oceanic Hotel, Madras. The appellant not only produced the passport before the receptionist of the Oceanic Hotel but he described himself as Comyn, British subject in the register maintained in respect of foreigners in the Hotel Oceanic. It is, therefore, clear that he falsely represented himself to the receptionist that he was Comyn when really he was not so. The learned Counsel for the appellant, in respect of this charge has contended that the alleged false representation to the receptionist of Oceanic Hotel is an independent and different transaction from the false representation alleged to have been made by the appellant at the Air port and that, therefore, the conviction has to be quashed on the ground of misjoinder of charges. I do not think there is substance in this argument. From section 537, Criminal Procedure Code, it is clear that no finding, sentence or

order passed by a Court of competent jurisdiction shall be reversed on appeal or revision on account of misjoinder of charges. I do not think, by the inclusion of this charge any material prejudice was caused to the appellant or it has occasioned a failure of justice. The conviction under this charge is confirmed.

Charge No. 6.—The appellant has been convicted under rule 26 (2) of the Defence of India Rules and sentenced to undergo rigorous imprisonment for five years. Rule 26 (2) of the Defence of India Rules provides as follows :

> " If any person enters India in contravention of any order made under sub-rule (1), or of the provisions of, or of any rule or order made under, the Indian Passport Act, 1920 (XXXIV of 1920) he shall without prejudice to any other proceedings which may be taken against him, be punishable with imprisonment for a term which may extend to five years, or with fine, or with both."

I have already found under charge No. 10 that appellant entered into this country with a forged passport (without a valid passport). Rule 3 of the Indian Passport Rules, 1950, prohibits any person entering into India without a valid passport. The appellant has clearly contravened rule 3 of the Indian Passport Act, 1920 which is made punishable under rule 26 (2) of the Defence of India Rules. The learned Counsel for the appellant argued that the prosecution has not established *mens rea* on the part of the appellant which, according to him, is an essential ingredient, especially when the sentence provided under rule 26 (2) is deterrent. I am unable to accept this contention. The appellant has come with a forged passport into this country. He knew he was not in possession of a valid passport. He deliberately and consciously contravened the provisions of the Indian Passport Act. It is not necessary for the prosecution to prove the motive of the appellant in violating the provisions. The Defence of India Rules were framed during emergency when there was external danger to our country. The Rules have been framed providing deterrent sentence to avoid any person coming to this country without a valid passport as it would not be possible to go into the motive of persons individually as to why they come to this country during the period of emergency. The conviction and sentence to five years rigorous imprisonment under Rule 26 (2) are confirmed.

Charge No. 7.—The appellant has been convicted under rule 3 read with rule 5 (*v*) and rule 6 of the Indian Passport Rules, 1950 for having entered this country without a valid passport. In view of the finding given under Charge No. 10 and under Charge No. 6, I find the conviction under this Rule by the lower Court is correct and it is, therefore, confirmed.

Charge No. 8.—The appellant has been convicted under section 420, Indian Penal Code, and sentenced to rigorous imprisonment for five years. The charge against the appellant is that he deceived P.W. 23 Sri V. Kuppuswami, Sub-Inspector of Police, Port Registration Office, Meenambakkam Air port by suppressing his real name and falsely representing himself to be a British subject and by using a false passport Exhibit P-40 and thereby fraudulently induced P.W. 23 to permit him to land at Madras by affixing a seal on the said passport and returned the said passport to him which P.W. 23 would not have done if he had not been so deceived and which act was likely to cause damage and harm to the said officer in mind and reputation. P.W. 23 stated that on 31st December, 1965, when he was on duty at the Air port, the appellant arrived from Colombo by Air Celyon flight at 6-15 P.M. and produced the passport Exhibit P-40 and the disembarkation card Exhibit P-56 before him. On a comparison of the passport photo with the appellant, he found that the person was the same. He questioned the appellant about his name and intended address in India and the appellant replied that his name was Barry Philips Charles Comyn and that he intended to go to Taj Hotel, Bombay. P.W. 23 believed the representation of the appellant to be true and had initialled in Exhibi

P-40 and had signed in Exhibit P-56 in token of his check with his seal and permitted him to enter. He further stated that if he had known that the appellant was a different person and that he had used the forged passport, he would not have permitted him to land and would not have returned the passport after affixing his seal. He further stated that subsequently he had been asked by his superior officers to offer an explanation when it was found that the person permitted by him was not Comyn but the appellant and as a result thereof he had been mentally upset. The evidence in this case is clear that the appellant by representation and his conduct and by the production of a forged passport had committed the offence under section 420 Indian Penal Code. The conviction and sentence under this charge are also confirmed.

Charge No. 9.—The appellant has been convicted under section 419, Indian Penal Code, for having falsely impersonated Comyn and represented that he was Comyn when he was not that person both by the production of the passport and oral representation to P.W. 23. It is clear from the evidence of P.W. 23, as discussed in the previous paragraph, that the appellant has committed this offence also. The conviction and sentence under this charge are also confirmed.

Charge No. 1.—The appellant has been convicted under section 5 (1) read with section 5 (3) and section 14 of the Foreigners Act, 1946 (XXXI of 1946). It is alleged that the appellant having entered India during January, 1962 calling himself as Daniel Bailey Walcott and having been ordinarily known as such, he entered India again through the Meenambakkam Air port on 31st December, 1965, under an assumed name " Barry Philips Charles Comyn " and used that name without any licence and permission of the Government of India. In respect of this charge, the learned Counsel appearing for the appellant contended that the appellant has not committed the offence under this charge as the prosecution has not proved the ingredients and the requirements of the provisions of the Foreigners Act with which the appellant was charged. To appreciate this contention, it is necessary to set out the relevant provisions of the Foreigners Act, 1946.

Section 5 (1) of the Foreigners Act says:

> " No foreigner who was in India on the date on which this Act came into force shall, while in India after that date, assume or use or purport to assume or use for any purpose any name other than that by which he was ordinarily known immediately before the said date."

Clause (2) is omitted as unnecessary. Clause (3) is as follows :

> " In relation to any foreigner who, not having been in India on the date on which this Act came into force, thereafter enters India, sub-sections (1) and (2) shall have effect as if for any reference in those sub-sections to the date on which this Act came into force there were substituted a reference to the date on which he first enters India thereafter."

Section 14 of the Foreigners Act is a penal provision which provides punishment for contravention of any of the provisions of this Act with imprisonment for a term which may extend to five years and fine. This Act came into force on 23rd November, 1946. The appellant was not admittedly residing in this country on the date the Act came into force. Hence, section 5 (3) will apply to the appellant in that he entered India after the Act came into force, namely, 15th January, 1962, section 5 (3) says that the words " to the date on which he first entered India thereafter " be substituted in Clause (1) of the same sub-section in the place of the words referred to therein " to the date on which this Act came into force." If section 5 (1) is read with the substitution of the words as referred to in clause (3) will read as follows :

> " No foreigner who first enters India after this Act came into force shall, while in India after that date, assume or use or purport to assume or use for any purpose any name other than that by which he was ordinarily known immediately before the said date."

The learned Special Public Prosecutor Sri V. P. Raman contends that the appellant had entered into this country in 1962 as Daniel Hailey Walcott and he made subsequent visits in the same name and that his having come on 31st December, 1965, with another name without the permission of the Central Government as required under clause (5) of section 5 would bring him within the mischief of section 5, clauses (1) and (3). I am unable to agree with this contention. The emphasis under section 5 (1) in my opinion, is that a foreigner while in India shall not assume or use any other name other than that by which he was ordinarily known. If a foreigner enters into this country and remains in this country, even for a short period, with a known name and he subsequently assumes or uses another name for any purpose without the permission of the Central Government, he will come within section 5 (3). If a foreigner visits this country with a known name and returns to his country and changes his name in his country according to the law and procedure of that country and if he comes again with that assumed name to this country and uses that assumed name, it cannot be said that he had assumed or used the name while, he was in this country. What is contemplated under section 5 is that a foreigner shall not change or use any other name other than the name by which he was known previously while he was in this country without the permission of the Central Government. It is not the case of the prosecution that the appellant has changed his name after he came to this country, but he came to this country with an assumed name. To my mind, the object of introducing this section appears to be that the Government should have control over all the foreigners, while in India and if the names are changed, the identity of the foreigners may become difficult. The Government in India cannot have any control over any foreigner who has visited this country once to have his name changed in his country according to the law of that country. If a foreigner has lawfully changed his name and comes to this country, it cannot be said he is committing as offence under section 5 (3). It will cause hardship and inconvenience to any foreigner who come with his name lawfully changed to expect him to get permission from the Central Government even before landing. How can any foreigner get permission from the Central Government before landing ? And the permission will again depend upon the discretion of the Government which may take in some cases considerable time. If the contention of the Special Public Prosecutior is accepted, the very moment a foreigner steps into this country in an assumed name, he will be committing the offence. I do not think that that is the intention of the Legislature. I am, therefore, of opinion that the prosecution has not proved the offence under this charge. The conviction and sentence are set aside and the appellant is acquired of Charge No. 1.

In the result, the conviction of the appellant under Charges Nos. 3 to 10 is confirmed.

So far as the sentence is concerned, the learned Counsel for the appellant strenuously pleaded for a lenient sentence. He urged that the appellant hails from a respectable family, that he had lost all his fortunes and that the prosecution has not shown that the appellant had come to this country with a hostile attitude or for a nefarious purpose. I am unable to accede to the request of the learned Counsel. The appellant wanted to gain entry into this country with a forged passport while the country was at war and the state of emergency prevailed. The appellant had come on prior occasions to this country and got into trouble during those visits. Even during prior visits, it appears he committed offences and non-bailable warrants were pending against him. The appellant should have known that if he were to go again to this country while non-bailable warrants were pending and that he was wanted in those offences, he would be apprehended. To avoid detection, he has come with a British passport as a British subject under an assumed name. The facts that the appellant had come to this country in spite of the difficulties and risks that he might have to face, indicates that he had not come for any legitimate purpose. In view of these circumstances, I do not think that it will be proper to reduce the sentences imposed on him. The sentences passed under Charges Nos. 3 to 10 are also confirmed.

The appeal is dismissed with the above modifications.

C. A. No. 815 of 1966.—The appellant Jean Claude Donze was charged under 10 counts of which he was convicted on counts Nos. 1 and 3 to 10 and was sentenced to various terms of imprisonment, the maximum being rigorous imprisonment for five years, the sentences to run concurrently by the Sessions Judge, Madras. The facts of the prosecution case are briefly these:

The appellant Jean Claude Donze has an *alias* name Pierre Carraud. He is a French National. On 10th November, 1961, he landed at Santa Cruz Aerodrome, Bombay, from Rome under the name of Pierre Carraud with a French passport. He left Bombay for Tokyo on 13th November, 1961. In the middle of the year 1962. he came back to India under the same name and stayed in Asokha Hotel, New Delhi, for a day and left the hotel abruptly with the key of the room occupied, by him and did not return to the hotel subsequently.

On 21st June, 1962, the appellant was found again near Mandapam Camp attempting to leave for Ceylon by a country-craft. He was arrested on suspicion. The appellant had a British passport in the name of E. V. Conway, a British National. He was also found to be in possession of a key of room No. 207, Asokha Hotel, New Delhi. On being questioned by the officer who arrested him, it appears that the appellant first told him that he was E. V. Conway and subsequently stated that he was Pierre Carraud and finally said that he was Jean Claude Donze.

Later, the appellant was prosecuted along with another in a case of smuggling and convicted and his finger print impressions were taken. He was detained in the Bombay District Prisons from 15th February, 1963 to 28th February, 1963. He had left the country again. On 29th June, 1963, the appellant returned to Delhi from Tel Aviv under the name of Donze Jean. On 15th September, 1963, the appellant left Delhi for Beirut under the name of Donze Jean Claude, a French National. He returned to New Delhi on 29th November, 1963, under name Donze Jean. He left Bombay for Beirut again on 21st December, 1963, under the name Jean Claude Donze. He arrived at Palam Air port from Beirut on 29th March, 1964, under the name Jean Donze and left for Beirut on 3rd April, 1964. These facts are admitted.

It appears, subsequently he obtained a British passport in the name of Stephen Thomas Lamb, a British National, and came to India. A case was registered against the appellant for having used a forged passport and impersonated a British National and it was pending. The appellant was wanted in that case.

While matters stood thus the appellant arrived at Meenambakkam Air port, Madras on 31st December, 1965, by an Air Ceylon flight and produced the passport Exhibit P-18 and the disembarkation card Exhibit P-19 to the Security Officer (P.W. 22) at Meenambakkam Air port. The passport and the disembarkation card stood in the name of S. T. Lamb, a British National. P.W. 22 Sri Sankaran, the Security Officer, on being satisfied that the photograph attached to the passport was that of the appellant who produced Exhibits P-18 and P-19, he was allowed to go.

The appellant then went to Hotel Oceanic along with another foreigner, the appellant in C.A. No. 810 of 1966 and registered his name in the arrival register as S. T. Lamb, British National, Ovington Gardens, London. The appellant left the Oceanic Hotel on the next day. He stayed in West End Hotel, Bombay. On 22nd January, 1966, he was arrested on suspicion. He produced a British passport Exhibit P-18. His finger prints were taken and compared with the finger print slip of Pierre Carraud taken on conviction earlier in 1962. The finger prints were found to be identical. The prosecution has let in ample evidence to show that the appellant is Jean Claude Donze *alias* Pierre Carraud and with that name, he had come to India on prior occasions. The appellant does not dispute that he is Jean Claude Donze.

The case for the prosecution is that the used a forged British passport fraudulently and impersonated Stephen Thomas Lamb and committed various offences as

charged. The subject-matter of all these offences is mainly the passport Exhibit P-18.

Thus, there cannot be any doubt that Exhibit P-18 is a forged passport and equally there is no doubt that the appellant used the forged passport fraudulently in order to gain entry into this country. P.W. 13, Mr. Charles Edward O'Hanlon, a British Constable attached to the New Scotland Yard stated that he verified the name and address given in Exhibit P-18 the passport namely, Stephen Thomas Lamb born in Finchley, London, on 29th October, 1925 at 42-A, Grove End Garden, N.W. 8, London, and found that there was no No. 42-A, in the Grove End Garden. He further stated that none of the inmates of the flats in No. 42 could recognise the photo in Exhibit P-18 and that no person by name Lamb lived there at any time. He found in the birth and death registers the entry relating to one Stephen Thomas Lamb that he was born on 29th October, 1925, and died when he was aged about 15 years in the year 1940 as a result of enemy bombing. It is, therefore, clear from the evidence of P.W. 13 that the name of a dead man has been obviously used for the purpose of getting the passport Exhibit P-18.

The appellant when questioned under section 342, Criminal Procedure Code, admitted that he was known as Jean Claude Donze and Pierre Carraud. He stated that he arrived at Meenambakkam Air port and gave the passport to the air hostess which according to him must have been given by her to P.W. 22. There is no reason to disbelieve the evidence of P.W. 22 who stated that the appellant produced the passport Exhibit P-18 and represented that he was Stephen Thomas Lamb and believed that the appellant was Stephen Thomas Lamb as borne by Exhibit P-18 and passed out the appellant. It is now, therefore, necessary to consider with the proved facts whether the convictions under the various charges could be sustained against the appellant.

Charge No. 1.—The appellant has been convicted for having assumed or used a different name, namely Stephen Thomas Lamb other them the known name under which he had come to this country or prior occasions, namely Jean Claude Donze or Pierre Carraud. I have discussed in detail under Charge No. 1 in C.A. No. 810 of 1966 in regard to the implication of section 5 (1) read with section 5 (3) of the Foreigners Act. I have held that a foreigner who changes his name other than the name known and recognised while he is in India, commits the offence contemplated under section 5. It does not apply to a foreigner who changes his name in his country and obtains a passport in that name lawfully and comes to this country with a valid passport. It is not the case of the prosecution that the appellant has changed his name after he came to this country or while he stayed here. The conviction under this charge cannot, therefore, he sustained. The conviction and sentence are set aside under this charge.

I propose to deal with Charge No. 10 which is the main charge in respect of using forged passport fraudulently (a valuable security). I have discussed under Charge No. 10 in detail in C.A. No. 810 of 1966 and found that a passport creates a legal right and, therefore, a valuable security within the meaning of section 30, Indian Penal Code. Page 2 of Exhibit P-18 which is a part of the passport is undoubtedly false and, therefore, it is a false document. The appellant does not say that it was not false. The signature of Stephen Thomas Lamb found in page 2 is forged by some one though not the appellant as the said Stephen was dead at the time of the issue of the passport. The evidence of P.W. 22 is very clear that the appellant lands at Meenambakkam Air port and produced Exhibit P-18 which is a forged document. P.W. 22 believed that it was genuine on the representation made by the appellant and allowed him to go. This charge has been clearly proved against the appellant. The conviction under this charge is confirmed.

The conviction under Charges Nos. 3, 6 and 7 are similar to those of Charges Nos. 6 and 7 in C.A. No. 810 of 1966. Charge No. 3 in under rule 55 (2) (*b*) read with rule 55 (3) of the Defence of India Rules. The possession or use of a forged

document is prohibited under the said rule. Charge No. 6 is in respect of rule 26 (2) of the Defence of India Rules which provides that if any person contravenes any rule or order made under the Indian Passport Act shall be punished. Charge No. 7 is respect of rule 3 read with rule 5 (*v*) and rule 6 of the Indian Passport Rules, 1950, which provides punishment for any person entering this country without a valid passport. As I have found under charge No. 10, the appellant used a forged passport and charges 3, 6 and 7 deal substantially with what is dealt with under Charge No. 10. I find the convictions under these charges are correct and they are confirmed.

Charges Nos. 4, 5, 8 and 9 are similar to those charges Nos. 4, 5, 8 and 9 in C.A. No. 810 of 1966. Charge No. 4 is in respect of rule 55 (2) (*c*) read with rule 55 (3) of the Defence of India Rules. It provides that no person shall personate or falsely represent himself to be a person to whom an official document relates. In this case, the passport related to Stephen Thomas Lamb. The appellant Jean Claude Donze has falsely impersonated the said Stephen Thomas Lamb mentioned in the passport and gained entry. Charge No. 5 is in respect of the same offence; but it relates to impersonation by false representation made to the receptionist of the Oceanic Hotel, Madras. The case of the prosecution is that the appellant represented to the receptionist of the Oceanic Hotel describing himself as Stephen Thomas Lamb and entered as such in the arrival register. These two charges are clearly made out and the convictions are confirmed. Charge No. 8 is that the appellant has deceived P.W. 22 Sankaran, the Security Officer, Meenambakkam Air port, by suppressing his real name and falsely representing himself to be a British subject by using a false passport Exhibit P-18 and thereby fraudulently induced P.W. 22 to permit him to land at Madras by affixing a seal on the said passport which P.W. 22 would not have done if he had not been so deceived. It is clear from the evidence of P.W. 22 that the appellant made a false representation by not only producing the passport but also making oral representation to him that he was Stephen Thomas Lamb and thereby induced him to permit him to land at Madras by affixing his seal. This representation was made fraudulently with a view to gain entry. The conviction under section 420, Indian Penal Code, is correct and is, therefore, confirmed. Charge No. 9 is under section 419, Indian Penal Code. In view of the finding given by me under charge No. 8. I confirm the conviction under charge No. 9 also.

In the result, the convictions of the appellant under Charges Nos. 3 to 10 are confirmed. He was acquitted under charge No. 1.

So far as the sentence is concerned, I am not impressed with the request made by the learned Counsel for the appellant for taking a lenient view. I have given reasons in C.A. No. 810 of 1966 as to why I am unable to reduce the sentence. The sentences passed under Charges Nos. 3 to 10 are also confirmed.

The appeal is dismissed, with above modifications.

S.V.J. *Appeals dismissed except for modification.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. RAMAMURTI AND MR. JUSTICE A. ALAGIRISWAMY.

Yasodammal and another .. *Appellants**

v.

Janaki Ammal .. *Respondent.*

Stamp Act (II of 1899), *section* 35—*Scope—Unstamped document—No relief can be given on the basis of it—Position same even if contesting party admits the execution of it and is in wrongful possession thereof.*

Transfer of Property Act (IV of 1882), *section* 53-*A—When can be invoked—Written agreement of sale—Material term varied subsequently by oral agreement—Section* 53-*A cannot be invoked.*

In the case of an unstamped document, as the prohibition contained in section 35 of the Stamp Act is wide and absolute, even though in the pleadings the contesting party may admit the execution of the unstamped document, no relief could be granted to the aggrieved party, on the basis of such admission, as it would amount to acting upon the unstamped document.

Alimane Sahiba v. *Subbarayudu*, (1932) 63 M.L.J. 303 and *Ponnuswami Chettiar* v. *Kailasam Chettiar*, (1947) 2 M.L.J. 116, overruled. Case-law discussed.

The prohibition contained in section 35 of the Stamp Act being absolute, an unstamped document cannot be acted upon for any purpose whatsoever and the fact that the document was being wrongly detained by the other side would not make any difference. The contention that in such a case the party who prevents the aggrieved party from validating the transaction by payment of the requisite stamp duty and penalty cannot take advantage of the fact that the document is unstamped, is not tenable.

Karthikeya v. *Singaram*, (1956) 2 M.L.J. 515 : A.I.R. 1956 Mad. 693, overruled. Case-law discussed.

The strict conditions and the requirements of section 53-A of the Transfer of Property Act should be satisfied before relief could be granted on the basis of the equitable doctrine of part performance enshrined therein. In other words, even while granting relief to the party concerned on principles of the equitable doctrine, there cannot be any equity apart from the limits prescribed by section 53-A of the Act.

Under section 53-A the party who invokes the doctrine of part performance, must have the document reduced to writing containing all the terms and conditions. Once it is found that a material portion, particularly the time for payment of the price, in an agreement of sale reduced to writing, has been orally varied or modified, it is clear that there is no written agreement of sale containing all the terms of the agreement satisfying the requirements of section 53-A. To such a case the section cannot apply.

Appeal against the Decree of the City Civil Court, (Fifth Assistant Judge), Madras, dated 30th March, 1961 in Original Suit No. 1710 of 1957.

M. S. Venkatarama Ayyar, R. Deenadayalu, V. Krishnan and *P. Veeraraghavan*, for Appellants.

A. Dorairaj, for Respondent.

The Judgment of the Court was delivered by

Ramamurti, J.—The plaintiffs in the lower Court are the appellants in this appeal. The suit has been filed by them to establish their title to the suit property, house and ground No. 12, New Street, Nungambakkam, against the first defendant who claims rights over the same in pursuance of an agreement alleged to have been entered into between the plaintiffs and the first defendant to

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* Appeal No. 4 of 1962. 16th January, 1967.

sell the suit property to the latter. The brief facts which led up to the appeal may be stated.

The property was purchased under Exhibit A-1 on 29th August, 1948 by the first plaintiff from one Pachai Pillai and Purshotham for a sum of Rs. 6,500. The parties are near relatives and their relationship can be stated with reference to Kullammal to whom frequent reference will have to be made in the course of this Judgment. Kullammal's daughter is the first plaintiff and her husband is the 2nd plaintiff. Pachai Pillai and Purushotham from whom the first plaintiff purchased the suit property under Exhibit A-1 are the sons of Kullammal's sister. Janaki, the 1st defendant, is Kullammal's sister's daughter. One Kanna Pillai to whom again reference will have to be made is the brother of the first defendant Janaki. Janaki's sister's husband is one Damodar. Kullammal being a near relative was living with the plaintiffs till about 1953-55. There is controversy between the parties as to when exactly Kullammal separated from the plaintiffs but it is unnecessary to find out when exactly Kullammal left the family of the plaintiffs. Under Exhibit A-20 dated 25th April, 1949, the first plaintiff purchased a house No. 3, Abbu Naicken Street, from one Gopalakrishnan for a sum of Rs.10,000. The case of the first defendant is that at that time the plaintiffs required money for paying the price for the house in Abbu Naicken Street, that in connection therewith the first plaintiff entered into an agreement sometime in April, 1949 to sell the suit property to the first defendant for a sum of Rs. 6,500, that at the time of the agreement she paid a sum of Rs. 3,500 to the plaintiff, and that the arrangement between the parties was that within two or three months thereafter the balance of Rs. 3,000 would be paid to the first plaintiff, and the sale transaction completed. It is the further case of the first defendant that as the first plaintiff was anxious to complete the transaction under Exhibit A-20 even earlier the first plaintiff desired the first defendant to pay the balance of Rs. 3,000 much earlier than the time stipulated under the previous agreement and that for that purpose it was agreed between the parties that the first plaintiff should be enabled to raise money, namely, Rs. 3,000 by mortgaging the suit property to the 2nd defendant. The further case of the first defendant is that in pursuance of that arrangement the first plaintiff executed a mortgage Exhibit A-2 dated 2nd May, 1949 in favour of the 2nd defendant and raised the sum of Rs. 3,000 which was utilised for completing the transaction under Exhibit A-20. In 1953 a house bearing door No. 42, Village Road, was purchased by Kullammal and between 1953-55 open hostility and misunderstandings arose between the plaintiffs and Kullammal in respect of properties purchased by the plaintiffs in which Kullammal claimed certain rights. As a result of these misunderstandings between the plaintiffs and Kullammal, the latter filed a suit in November, 1955 O.P. No. 9 of 1956 which ultimately was numbered as O.S. No. 645 of 1957 in which Kullammal claimed certain rights as against the present plaintiffs. The suit was hotly contested. I am referring to this even at the threshold to indicate whether it was in 1953 or 1956 pronounced hostility existed between the plaintiffs on the one hand and Kullammal on the other.

Meanwhile notices passed between the plaintiffs and defendants through their lawyers. In 1956 on behalf of the plaintiffs notices were issued to the tenants as well as to the defendants in which it was claimed that the defendants were relying on some agreement, alleged to have been signed by the plaintiffs. It was also alleged in those notices that in the alleged agreement their (plaintiffs') signatures were obtained by Kullammal by fraudulent misrepresentation and that it would not bind their interests. The final reply notice which was sent on behalf of the first defendant is Exhibit A-17 dated 4th April, 1957 and the present suit has been filed in July, 1957.

The points which arise for decision in this case are (1) whether factually there was an agreement of sale entered into between the plaintiffs and the first defendant, (2) whether that agreement was in writing and whether the first defendant who relies upon the agreement has satisfactorily accounted for the non-production of

the same, (3) as the agreement was admittedly unstamped whether any relief can be granted to the first defendant on the basis of such an agreement and (4) whether the alleged agreement of sale satisfies the requirements of the stringent conditions of section 53-A of the Transfer of Property Act, and (5) is it open to the first defendant to invoke the doctrine of part performance when all the conditions and terms of the agreement of sale are not embodied in writing *i.e.*, some terms are in writing while some essential terms are oral.

The points for decision arise in a short compass and both the learned Judge and the parties in the lower Court have digressed and have not focussed their attention on certain clinching and decisive features in this case evidenced by documents which clearly go to show that the alleged agreement of sale is not true and at any rate it was not reduced to writing and that the first defendant has totally failed to explain the non-production of the same.

We shall first take up for consideration the question about the truth of the agreement and whether it was in writing. As both the points overlap and cannot be separately dealt with they may be conveniently dealt with together.

[After discussing the evidence their Lordships proceeded.]

It is unnecessary to refer to the oral evidence on the side of the plaintiffs, as we are satisfied that the documentary evidence and the oral evidence adduced on the side of the defendants totally fail to establish (*a*) that there was an agreement of sale, (*b*) that the agreement of sale was evidenced by writing, and (*c*) that the same had been handed over to the 1st plaintiff.

In view of our findings it may not be necessary to express our opinion as to whether the 1st defendant could be awarded any relief on the basis of the secondary evidence consisting of the admissions alleged to have been made by the plaintiffs in the notice issued on their behalf or on the basis of the oral evidence adduced by D.W. 1 and D.W. 2 in the case. In the first place it has to be mentioned that in the notices, which were issued on behalf of the 1st plaintiff, there is no clear and unqualified admission about the agreement of sale. The averment in the relevant notices had to be taken as a whole and it is clear that the 1st plaintiff has not admitted that she had executed an agreement of sale. Her case is that the alleged agreement of sale was a fraudulent transaction and that her signature was obtained as a result of fraud and misrepresentation by Kullammal. There is no unqualified or unequivocal admission of the execution of an agreement of sale. Secondly, the terms and conditions of the agreement of sale are not referred to in those notices. Those notices cannot be regarded as containing any secondary evidence of the admission of the contents and terms of the alleged agreement of sale.

So far as the oral evidence is concerned, the evidence is not precise. The time for performance is stated as two or three months, and all the terms are not spoken to in the evidence.

Mr. M. S. Venkatarama Ayyar, learned Counsel for the appellants, urged that even assuming that the secondary evidence relied upon by the 1st defendant covered the terms and conditions of the sale, no relief could be granted to the 1st defendant on the basis of the same in view of the mandatory provisions of section 35 of the Stamp Act. Learned Counsel urged that as the alleged agreement of sale is admittedly unstamped section 35 prohibits that the document shall not be acted upon by the Court in any manner. He urges that awarding relief to the 1st defendant on the basis of the secondary evidence would be acting upon the unstamed instrument coming within the prohibition of section 35 of the Stamp Act. We see considerable substance in this argument, which is supported by ample authorities. This is clear from the express terms of the section. The importance of the significant words "No instrument chargeable with duty shall be admitted in evidence *for any purpose* by any person, etc. or shall *be acted upon*, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped" in section 35 of the Indian Stamp Act has come up for consideration in striking

contrast to the provisions in section 49 of the Indian Registration Act, particularly in the context of the contesting party admitting the execution of an unstamped or unregistered agreement as the case may be. In the case of an unregistered document it has been held that if the contesting party admits the document in the pleadings, thereafter there is no necessity for further proof of the facts admitted, and therefore there is no occasion for the parties to adduce evidence so as to attract the applicability of section 49 of the Registration Act. But in the case of an unstamped document it has been held that as the prohibition contained in section 35 of the Stamp Act is wide and absolute, even though in the pleadings the contesting party may admit the execution of the unstamped document, no relief could be granted on the basis of the admission, as it would amount to acting upon the unstamped document. Reference may be made to the observations of the Full Bench in *Mallappa* v. *Matum Nagu Chetty*[1] where a subsequent oral agreement modifying the terms of a registered mortgage bond was relied upon and the same was admitted in the written statement. In that case it was held that section 49 of the Registration Act was not a bar inasmuch as the subsequent oral agreement had been admitted in the pleadings under section 58 of the Evidence Act. The learned Chief Justice, Wallis, C. J., put the matter thus at page 48:

> " Under section 58 of this Chapter, among the facts which need not be proved, are facts admitted in the pleadings, such as the subsequent agreement now in question. Evidence is tendered in proof of facts in issue; and no question of the admissibility of evidence, oral or documentary, arises when proof is dispensed with in consequence of an admission in the pleadings either under section 58 or under the provision of the Code of Civil Procedure. Whereas in *Chenbasappa* v. *Lakshman Ramachandar*[2], the legislature had enacted, not only that an unstamped promissory note should not be receivable in evidence, but also that it should not be ' acted on,' it was held that the Court was precluded from acting on the note by giving a decree on it, even though execution was admitted."

The leading decision referred to is the decision in *Chenbasappa* v. *Lakshman Ramachandra*[2], where Sargent, C.J., delivering the judgment of the Bench held that even though the execution of the hundis in question was admitted in the pleadings, no decree could be passed upon such an admission, which would amount to acting upon an unstamped document within the meaning of section 35 of the Indian Stamp Act. The principle of this decision was followed and applied in *Achutaramanna* v. *Jagannatham*[3], in which it was held that despite an admission in the pleading under section 58 of the Indian Evidence Act the bar under section 35 would apply. The attention of the learned Judge was drawn to the decision in *Alimane Sahiba* v. *Subbarayudu*[4], in which a contrary view was taken. But it was held that the decision in *Alimane Sahiba* v. *Subbarayudu*[4], did not consider the true effect of the language of section 35 of the Stamp Act. The attention of the learned Judge was also drawn to the leading decision in *Chenbasappa* v. *Lakshman Ramachandra*[2]. The significant difference in the language of the Stamp Act and the Registration Act came up for discussion before the Privy Council in *Ram Rattan* v. *Parma Nand*[5]. Indeed the Privy Council held that having regard to the use of the language of the words ' for any purpose ' in section 35 of the Stamp Act an unstamped partition deed cannot be looked at even for the collateral purpose of proving a formal division in status. At page 68 the Privy Council has adverted to the significance of the languge and of the wider prohibition contained in the Stamp Act in contrast to the language in sections 49 and 17 of the Registration Act. It is necessary to refer to the decision in *Ponnuswami Chettiar* v. *Kailasam Chettiar*[6], where Rajamannar, J., (as he then was) has followed the earlier decision in *Alimane Sahiba* v. *Subbarayudu*[4], and passed a decree in favour of the plaintiff based upon the admission of the execution of the unstamped promissory note contained in the written statement of the defendant.

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1. (1918) 35 M.L.J. 555 : I.L.R. (1919) 42 Mad. 41.
2. (1894) I.L.R. 18 Bom. 369.
3. (1933) 64 M.L.J. 79.
4. (1932) 63 M.L.J. 303.
5. L.R. 73 I.A. 28 : (1946) 1 M.L.J. 295 : I.L.R. 27 Lah. 63.
6. (1947) 2 M.L.J. 116.

The attention of the learned Judge does not appear to have been drawn to the several decisions referred to earlier and in particular to the observations of the Privy Council about the significant language of section 35 of the Stamp Act. The attention of the learned Judge was also not drawn to the fact that in the latter decision in *Achutaramanna* v. *Jagannadham*[1], the earlier decision in *Alimane Sahiba* v. *Subbarayudu*[2], was not followed. With great respect to the learned Judges, the view taken in *Alimane Sahiba* v. *Subbarayudu*[2], and *Ponnuswami Chettiar* v. *Kailasam Chettiar*[3], is not correct and is opposed to the plain language of section 35 of the Stamp Act (*vide* also Mulla's criticism in Mulla's Stamp Act at page 126). On this portion of the argument it was urged on behalf of the respondent by Mr. Dorairaj, that this plea would not be open to the plaintiffs, who are in possession of the unstamped agreement. Learned Counsel urged that the plaintiffs are wrongdoers and if the plaintiffs had produced the agreement of sale, even though unstamped, his client would have got the document admitted in evidence on payment of the requisite stamp duty and penalty, and a party who prevents the aggrieved party from validating the transaction by payment of stamp duty and levy of penalty cannot take advantage of the fact that the document is unstamped. In support of this contention learned Counsel relied upon the judgment of Krishnaswami Nayudu, J., in *Karthikeya* v. *Singaram*[4]. It is true that the decision supports the contention urged on behalf of the respondent. There the defendant relied upon the written agreement of lease while invoking the doctrine of part-performance under section 53-A of the Transfer of Property Act. On the facts it was found that the alleged agreement of lease was unstamped and the plaintiff who was resisting the claim was in possession of the same. The defendants' claim was upheld on the basis of the admission by the plaintiff, of the terms of the written agreement of lease though unstamped, and by reason of the fact that plaintiff was responsible for the suppression of the unstamped documents. A perusal of the judgment shows that when a party is placed in such a predicament of not being able to validate a document by payment of penalty, he could nevertheless be awarded relief if the unstamped document was in the possession of the other side. With respect, we are unable to agree with this view. In the first place, as observed earlier, section 35 of the Indian Stamp Act operates as a clear bar and even the admission of the defendant cannot be relied upon by the plaintiff to award any relief to him. The attention of the learned Judge does not appear to have been drawn to an earlier decision in *Subbiah Pillai* v. *Muthathal Achi*[5], in which it was held that even if the contesting party was in wrongful possession of an unstamped document, relief could not be given to the other side. Chandrasekhara Aiyar, J., who delivered the judgment took the view that the prohibition contained in section 35 of the Stamp Act was absolute *i.e.*, the document could not be acted upon for any purpose whatever and the fact that the document was being wrongfully retained by the other side would not make any difference. The learned Judge observed that once it was conceded that the document in question was unstamped, the suppression by the defendant of the document would not render the position for the plaintiff any the better, as the prohibition in section 35 would be attracted and would come into play.

Our attention was also drawn to some relevant decisions in England in which the view has uniformly been taken that, if the document is unstamped no relief could be granted, even though the document is in the hands of the contesting party, who is a wrongdoer. In *Rippiner against Wright*[6] the agreement was unstamped and the contesting party took the document from the other side and destroyed it. Still it was held that no relief could be granted, as the document was unstamped. It was held that considerations of equity would not come into play in the face of the express provisions of the statute and that the statute required the parties to take care that when a document was executed it should be properly stamped and that one of the risks attendant upon an omission to do this would be that if an accident happened and the agreement was not produced, there would be

1. (1933) 64 M.L.J. 79.
2. (1932) 63 M.L.J. 303.
3. (1947) 2 M.L.J. 116.
4. (1956) 2 M.L.J. 515 : A.I.R. 1956 Mad. 693.
5. (1946) 1 M.L.J. 308.
6. (1819) 106 E.R. 440.

no remedy upon it whatsoever. In *Smith* v. *Henley*[1], the same view was taken that a Court of Equity could not any more than a Court of law receive parole evidence of the contents of a written agreement, which appeared never to have been stamped, even where it was proved to have been fraudulently destroyed by the party against whom it was sought to be enforced. The argument, that just as in the case of Statute of Frauds, which was founded on public policy, relief could be awarded though against the express words of the revenue laws in the case of fraud was not accepted. The Lord Chancellor held that the Stamp Act was passed for the protection of the revenue and it expressly provided that the instrument should not be proved in evidence unless properly stamped and that in the face of the statute the Court had no power under any circumstances to dispense with that condition. It is not necessary to refer to the other decisions on the point. The 1st defendant cannot be awarded any relief even assuming that the agreement is in writing and it is wrongfully withheld by the 1st plaintiff.

Lastly, learned Counsel for the appellants urged that as the further case of the 1st defendant is that subsequent to the alleged written agreement of sale, there was an alteration of a material condition of the contract, namely that the 1st defendant need not pay the balance of Rs. 3,000 within two or three months after the agreement of sale but can take his own time to discharge the mortgage in favour of the 2nd defendant, which in this case took place in 1956, the first defendant is not entitled to invoke the doctrine of part-performance. In a recent decision of the Supremt Court in *Ramachandrayya* v. *Satyanarayana*[2], it has been pointed out that the doctrine of equity of part-performance has been introduced in the Transfer of Property Act only in a limited form and that the strict conditions and the requirements of section 53-A of the Transfer of Property Act should be satisfied before granting relief to the parties concerned on the basis of the doctrine. In other words, even while granting relief to the party concerned on principles of the equitable doctrine of part-performance, there cannot be any equity apart from the limits prescribed by section 53-A of the Act. Learned Counsel Sri. Venkatarama Ayyar drew our attention to the statement of law in 8 Halsbury's Laws of England, Third edition, Volume 8, at page 154, paragraph 264, where it is stated that if the contract is one which is required by law to be made in writing it cannot be varied by a new oral agreement, even if the variation relates only to a part of the contract, which if it stood by itself, would not be required to be in writing. Learned Counsel also invited our attention to some of the decisions dealing with this aspect including the decision in *Vezey* v. *Rashleigh*[3], in which it was held that parole evidence was not admissible to prove a subsequent agreement to vary the terms of a contract in writing and by law required to be in writing, although it would be admitted to prove rescission of such a contract. It is unnecessary to refer to the several other decisions on the point, as the principle is clear namely after the agreed variation or modification of some of the terms of the contract the original written contract is not contract which binds the parties and the only contract which binds is the written contract along with the subsequent terms modified orally and therefore there is no written contract governing completely the rights and obligations of the parties as required by law. Under section 53-A the party, who invokes the doctrine of part-performance, must have the document reduced to writing containing all the terms and conditions. Once it is found that the material portion, particularly the time for payment of the price, has been orally varied or modified, it is clear that there is no written agreement of sale containing all the terms of the agreement satisfying the requirements of section 53-A of the Transfer of Property Act. It has therefore to be held that the 1st defendant on her own showing is not entitled to invoke section 53-A of the Transfer of Property Act.

In the view we have taken about the agreement of sale it is unnecessary to refer to the other aspects of the matter. We are not satisfied that on the evidence the 1st defendant obtained possession of the property in pursuance of the agreement of sale.

1. 41 E.R. 680.
2. (1964) 1 S.C.J. 109 : (1964) 1 M.L.J. (S.C.) 46: (1964) 1 An.W.R. (S.C.) 46 : (1964) 3 S.C.R. 984: A.I.R. 1964 S.C. 877.
3. L.R. (1904) 1 Ch. D. 634.

There is great discrepancy in the evidence about the payments made to the mortgagee, when and by whom they were made and in what instalments. The account books of the mortgagee and the entries of receipt of payments do not tally with the evidence adduced in the case. We are also not satisfied with the evidence adduced on the side of the defendants as to the collection of rents made by either Kanna Pillai or the 1st defendant. The result therefore is that the 1st defendant has totally failed to make out the agreement of sale set up by her.

In the result the judgment of the learned City Civil Judge is set aside and the plaintiff's suit is decreed as prayed for, with costs both here and in the trial Court. It is needless to observe that the 1st defendant shall be entitled to pursue her own remedies against the plaintiffs if she is entitled to any in respect of moneys alleged to have been paid either by her or on her behalf to the mortgagee, the 2nd defendant in the suit. Nothing said in this judgment should be understood as our expressing any final opinion as to who collected and received the rents and as to who exactly paid the moneys to the mortgagee whether it was the plaintiffs or the 1st defendant, and whether as between them there is any claim for reimbursement. These are all matters which have to be agitated and considered in appropriate proceedings. The mesne profits due to the plaintiffs shall be enquired into and determined by the trial Court.

V.K. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE N. KRISHNASWAMY REDDI.

Paramasivam Chettiar .. *Petitioner**

v.

State .. *Respondents.*

Criminal Procedure Code (V of 1898), *sections* 10, 117 (1) *and* 337 (1)—*Tender of pardon by First Class Magistrate on the sanction given by Additional District Magistrate—Whether valid —Power of Additional District Magistrate appointed under section* 10 (1) *to give sanction.*

Section 337 (1), Criminal Procedure Code, with its Proviso requires two conditions to be complied with in respect of tendering pardon by a First Class Magistrate during the investigation of an offence (1) he must be a Magistrate having jurisdiction in a place where the offence might be enquired into or tried ; and (2) he must have obtained the sanction of the District Magistrate for tendering pardon.

Under section 337 (1), Proviso, the sanction can be obtained only from the District Magistrate. Under section 10 (1), the State Government can appoint a Magistrate of the First Class, who will be called the District Magistrate. It is clear under section 10 (2) that the State Government may confer all or any of the powers *under the Code,* exercisable by the District Magistrate of the district by virtue of his appointment under section 10 (1). All the powers under the Code will undoubtedly mean the powers conferred on the District Magistrate under any provision in the Criminal Procedure Code. The powers are not limited only to those enumerated in the Schedule. The Code gives power to the District Magistrate to give sanction. No limitation can be placed on the language of section 10 (2) "all or any of the powers under this Code" to the powers enumerated under the Schedule.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Special Additional First Class Magistrate, Kumbakonam, dated 27th April, 1967 and made in C.M.P. No. 6 of 1967 in P.R.C. No. 1 of 1967.

* Cr.R.C. No. 594 of 1967. (Cr.R.P. No. 586 of 1967). 6th July, 1967.

R. Balasubramanian, for Petitioner.

The Assistant Public Prosecutor, for State.

The Court made the following

ORDER.—Though several points were raised by the learned Counsel appearing for the petitioner, only one point was pressed before me, *viz.*, that First Class Magistrate (Executive), Pattukottai, had no jurisdiction to tender pardon to the two approvers, as the sanction obtained by him from the Additional District Magistrate Thanjavur, was invalid.

What happened in this case was the First Class Magistrate, Pattukottai, during the investigation of the case, tendered pardon under section 117 (1), Criminal Procedure Code, to two approvers on the sanction given by the Additional District Magistrate. It is contended by the learned Counsel that the Additional District Magistrate had no powers to accord sanction to the First Class Magistrate for tendering pardon under section 337 (i), Criminal Procedure Code. To appreciate the contention of the learned Counsel, it is necessary to set out the relevant provision of the Criminal Procedure Code.

Section 337, Clause (1), Criminal Procedure Code, is as follows :—

"In the case of any offence triable exclusively by the High Court, or Court of Sessions, or any offence punishable with imprisonment which may extend to seven years, or any offence under any of the following sections of the Indian Penal Code, *viz.*, sections 161, etc., etc., the District Magistrate, a Presidency Magistrate, a Sub-Divisional Magistrate, or any Magistrate of the First Class, may, at any stage of the investigation or enquiry into, or the trial of the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof:

Provided, that, where the offence is under enquiry or trial, no Magistrate of the First Class other than the District Magistrate, shall exercise the power hereby conferred, unless he is the Magistrate making the enquiry or holding the trial, and, where the offence is under investigation, no such Magistrate shall exercise the said power unless he is the Magistrate having jurisdiction in a place where the offence might be enquired into or tried and the sanction of the District Magistrate has been obtained to the exercise thereof."

This section with its proviso requires the following two conditions to be complied with in respect of tendering a pardon by a First Class Magistrate during the investigation of an offence:

"(1) he must be a Magistrate having jurisdiction in a place where the offence might be enquired into or tried ; and

(2) he must have obtained the sanction of the District Magistrate for tendering pardon."

It is not disputed in this case by the learned Counsel that the First Class Magistrate, Pattukottai, had jurisdiction over the place where the offence might be enquired into or tried and that sanction was given to him by the Additional District Magistrate to tender pardon.

The next question tobe considered is whether the Additional District Magistrate, Thanjavur, had powers to accord sanction to the First Class Magistrate, Pattukottai.

Under the Proviso to section 337 (1), the sanction can be obtained only from the District Magistrate. Under section 10 (1) of the Criminal Procedure Code, the State Government can appoint a Magistrate of the First Class,who will be called the District Magistrate. Section 10, clause (2) of the Code provides as follows :—

"The State Government may appoint any Magistrate of the first class to be an Additional District Magistrate and such Additional District Magistrate shall have all or any of the powers of a District Magistrate *under this Code*, or under any other law for the time being in force, as the State Government may direct."

In this case, it is not disputed that the State Government appointed the Collector of Thanjavur as the Additional District Magistrate under section 10 (2) of the Criminal Procedure Code and conferred all the powers exercisable by the District Magistrate under the Code. The ordinary powers of the District Magistrate are enumerated in Schedule III Part V of the Criminal Procedure Code in which the power to give sanction to the First Class Magistrate for tendering pardon is not included. From this, the learned Counsel for the petitioner points out that though the Additional District Magistrate was clothed with all the powers of the District Magistrate by the State Government, as the power to grant sanction is not includde in the schedule and that such power to sanction being a special power it cannot be said that such special power was conferred on him. I am unable to agree with the contention of the learned Counsel. It is clear under section 10 (2) that the State Government may confer all or any of the powers *under the code* namely Criminal Procedure Code, exercisable by the District Magistrate of the District by virtue of his appointment under section 10 (1) of the Criminal Procedure Code. All the powers under the Code will undoubtedly mean the powers conferred on the District Magistrate under any provision in the Criminal Procedure Code. The powers are not limited only to those enumerated in the schedule. The Code gives power to the District Magistrate to give sanction. This power is not conferred by the State Government on him as is done in the case of Additional District Magistrate. If the District Magistrate is specially empowered by the State Government to do a thng by virtue of a power conferred on the State Government, such power may not be said to be a power under the Code but that will be a special power. It is not the case here. As already noted, the power to give sanction to a First Class Magistrate is provided under the Code itself. No limitation can be placed on the language of section 10 (2) "all or any of the powers under this Code" to the powers enumerated under the Schedule.

Sadasivam, J., in *Manicka Pandurar* v. *State*[1] while considering this point held that the powers under the Code of Criminal Procedure cannot be confined to the powers mentioned in Schedule III to the Code. I respectfully agree with Sadasivam, J.

The learned Counsel for the petitioner drew my attention to a decision of the Supreme Court in *Ajaib Singh* v. *Gurbachan Singh*[2]. The Supreme Court was concerned in that decision with the point whether an Additional District Magistrate appointed under section 10 (2) though clothed with all the powers of a District Magistrate was of the same rank of a District Magistrate or below the rank. It was held that an Additional District Magistrate appointed under section 10 (2) is undoubtedly below the rank of a District Magistrate appointed under section 10 (1) even though all the powers of a District Magistrate are conferred under section 10 (2) on the Additional District Magistrate. We are not concerned with that point in this case. I do not think the decision reported in the above case has got any bearing on the point to be decided in this case.

I, therefore, find that the First Class Magistrate, Pattukottai, who tendered pardon to two approvers had valid sanction as required under section 337 of the Criminal Procedure Code, and that he had jurisdiction to do so.

This petition is dismissed.

S. V. J. ——— *Petition dismissed.*

1. (1963) M.W.N. (Crl.) 158.
2. (1965) M.L.J. (Crl.) 431: (1965) 2 S.C.J. 96: (1965) 2 S.C.R. 845 : A.I.R. 1965 S.C. 1619.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. S. KAILASAM.

P. S. Surulichamy ... *Petitioner**

v.

S. Hari Jeggiappan and others ... *Respondents.*

Madras Co-operative Societies Act (*LIII of* 1961), *sections* 65 *and* 115—*Power of enquiry officer to call for a meeting under section* 65—*If can convene a meeting for removal of existing members of a committee and for electing new members—Scope of section* 115.

Madras Co-operative Societies Rules (1963), *rule* 30—*Scope—Requirement as to notice under, mandatory.*

Constitution of India (1950), *Article* 226—*Prayer for* quo warranto *or such other appropriate writ—Power of Court to grant appropriate relief when it finds that writ of* quo warranto *could not be granted—Removal of members of committee of a registered co-operative society—Wriet Petition by one of them—Maintainability—Existence of alternative remedy—Effect.*

The powers conferred on the Registrar or on the enquiry officer to call for a general body meeting under sub-section (2) (*d*) (ii) of section 65 of the Madras Co-operative Societies Act, 1961, are after the failure of the officer or officers of the society to call such a meeting required to be convened under sub-section (2) (*d*) (i). The power of the enquiry officer flows from the refusal of the officers of the society to call such a meeting and when the enquiry officer had failed to require the officer or the officers of the society to call such a general meeting, the enquiry officer will have no power to act under section 65 (2) (*d*) (ii). The contention that the provision is only directory cannot be accepted. Such a defect is not cured by section 115.

Further, the powers conferred on the Registrar and the person authorised to conduct an enquiry under section 65 are only for the purpose of holding an enquiry into the constitution, working and the financial conditions of the registered society and the provisions relating to the calling of a general body meeting can only be for any one of the aforesaid purposes. The calling of a meeting for the purpose of removal of the existing members of the committee and for election of new members would be outside the scope of section 65.

Rule 30 of the Madras Co-operative Societies Rules, 1963, prescribes the procedure for the election of members of the committee of a society nct falling under rule 29. The rule requires that the election shall be held at a general meeting of the society specially convened for the purpose, for which not less than seven days' clear notice shall be given to the members. Election of the members to the committee without the requisite notice under rule 30 would be invalid. Section 115 ol the Madras Co-operative Societies Act will not cures such a defect.

Where the relief asked for in a writ petition is for the issue of a writ of *quo warrento* or a writ of *mandamus* or such other writ which the Court may deem fit and proper, the Court is entitled to grant relief which is appropriate taking into consideration the facts of the case, when it finds that a writ of *quo warranto* or *mandamus* would not lie.

Where in an election purported to have been held by the general body, the existing members of the society had been removed and new members had been elected, any member of the society who had been removed, if aggrieved, is entitled to the correction of his removal by filing a writ petition. The contention that such a member cannot himself maintain a writ, as the co-operative society is a registered society and that the petition should be filed by the society or the entire body of directors, is untenable.

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* W. P. Nos. 2732 and 2908 of 1966. 17th July, 1967.

It is true that the petitioner has an alternative remedy. But that remedy could not be had without great inconvenience and prejudice to the petitioner. The fact that an alternative remedy is available would not deprive the High Court of its power to issue a writ.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavits filed therewith the High Court will be pleased to (1) call for the records concerned with the case in the possession of the Sillamarathupatti Co-operative Agricultural Bank Ltd., Sillamarathurpatti, the eighth respondent herein and in the possession of the other respondents and issue a writ of *quo warranto* or other appropriate writ, order or direction in the nature of writ against the respondents Nos. 1 to 7, calling upon them to show cause on what authority they hold office as members of the committee of the eighth respondent herein (W. P. No. 2732 of 1966), (2) call for the records from the respondents pertaining to the first respondent in connection with the proceeding dated 3rd October, 1966, and issue a writ of *mandamus* or such other writ, order or direction in the nature of a writ against the respondents directing them to admit the committee as on 2nd October, 1966, with the petitioner as President and Raghupathy Kothanda Vijayaraman, S. Doddichakku, S. V. Mani, T. K. Surulivel Gounder, Jaggiappan and S. Manichamy as members to the office of the Committee of the first respondent (W.P. No. 2908 of 1966).

S. Balathandapani, for Petitioner.

K. K. Venugopal, S. *Ramalingam*, *M. Krishnappa*, and *T. Selvaraj*, for the Government Pleader, for Respondents.

The Court made the following

ORDER.—Writ Petition No. 2732 of 1966 is filed for the issue of a writ of *quo warranto* to respondents 1 to 7 calling upon them to show cause on what authority they hold office as members of the committee in the Sillamarathupatti Co-operative Agricultural Bank, Ltd., Sillamarathupatti. Writ Petition No. 2908 of 1966 is filed for the issue of a writ of *mandamus* against the Sillamarathupatti Co-operative Agricultural Bank Ltd., directing the bank to admit the committee as on 2nd October, 1966, with the petitioner as the President and six others mentioned in the petition as members of the committee of the Bank. As the two writ petitions arise out of the same matter, they can be dealt with together.

The petitioner in the two writ petitions, and six others were elected to the committee of the Sillamarathupatti Co-operative Agricultural Bank, Ltd., in 1965 for a term of three years. As one-thord of the members of the committee had to retire on the 1st of July, 1966, lots were cast to determine the names under the provisions of section 27 (3) (*a*) of the Madras Co-operative Societies Act, LIII of 1961 (hereinafter called the Act). According to the lots cast, the then President of the Co-operative Society, Sri T. C. V. Muthiah Goundar and one Sri S. Palanichamy were to retire on the 1st of July, 1966. According to the petitioner, the out-going President did not take any step for convening a special meeting of the general body to elect two new members to the Committee, in the places of the two persons who had gone out on casting of lots. There were disputes between the petitioner and his supporters on the one side, and the third respondent on the other which resulted in the appointment of the tenth respondent as the enquiry officer under section 65 of the Act by the Deputy Registrar of Co-operative Societies, Periakulam Taluk, the ninth respondent.

The tenth respondent issued a notice on 30th September, 1966, calling for special meeting of the general body to consider the question of re-electing new committee for the society. The notice was pasted at the registered office of the Society, and no individual notice was served on the members. The meeting took place on 3rd October, 1966. As to what took place in the meeting is a matter of controversy. Suffice it to say, that there was a record in the minutes book stating that there was a no-confidence resolution passed against the existing committee and that a new

committee consisting of respondents 1 to 7 was elected to function as the committee. The petitioner approached the Deputy Registrar and complained that the meeting was never held and that the recording in the minutes book was false. The ninth respondent declined to interfere stating that the petitioner may file an arbitration plaint under section 73 of the Act. In this Writ Petition it is contended on behalf of the petitioner that the tenth respondent had no powers to call for a special meeting of the general body to elect a new committee and consequently the meeting held is illegal and void. He also submitted that no meeting in fact was conducted on 3rd October, 1966. It was further contended that there was no notice for the holding of the general body meeting for the election of the committee members. While in Writ Petition No. 2732 of 1966, the petitioner has prayed for the issue of writ of *quo warranto* against respondents 1 to 7 directing them to show cause on what authority they hold office as members of the committee and to restrain them from taking charge of office as members of the committee, in Writ Petition No. 2908 of 1966, the petitioner has prayed for the issue of a writ of *mandamus* against the respondents directing them to admit the committee as on 2nd October, 1966 with the petitioners as the President and the other six persons mentioned in the petition as members of the committee.

Before dealing with the powers of an enquiry officer appointed under section 65 of the Act, it is necessary to refer to some of the provisions of the Act (LIII of 1961) relating to the administration of co-operative ocieties. Chapter II deals with the registration of co-operative societies. Section 9 provides that if the Registrar is satisfied that the application for the registration of a society is in accordance with the provisions of this Act and the rules, and that the proposed bye-laws are not contrary to this Act or the rules or to co-operative principles and that the society will, in his opinion, work successfully, he may register the society and its bye-laws. Section 114 of the Act provides that every society which had been registered before the coming into force of Act LIII of 1961 shall be deemed to be registered under this Act, and its bye-laws so far as the same are not inconsistent with the express provisions of this Act, shall continue in force until altered or rescinded. The provisions of the bye-laws of the societies registered before the coming into force of this Act are preserved, unless they are inconsistent with the express provisions of the Act. Section 26 provides that subject to the provisions of this Act, the rules and the bye-laws, the ultimate authority of a registered society shall vest in the general body of its members. The proviso to the section enacts that this clause shall not affect the exercise by the committee or any officer of a registered society of any power conferred on such committee or such officer by this Act or the rules or the bye-laws. Section 26 (2) provides that a general body meeting shall be held once in a year for the purposes mentioned in clauses (*a*) to (*e*) of section 26 (2). Section 26 (3) provides that the committee may, at any time, call a special general meeting of the registered society on requisition from the authorities specified in clause (*a*) to sub-section (3) of section 26. The general body of a registered society is required to constitute a committee in accordance with the bye-laws and entrust the management of the society ot such a committee. The term of office of the elected member of any committee constituted under the Act shall be three years. It is provided that one-third of the members elected to the committee will retire every year and an election will be conducted to fill up the places of the retiring members. Section 28 (1) enumerates the disqualifications for being a member of the committee. Section 28 (2) provides that a member of the committee shall cease to hold office subject to the disqualifications mentioned in the sub-section. The committee of the registered society can be superseded by the Registrar under section 72 of the Act, when the society is not functioning properly or wilfully disobeys or wilfully fails to comply with any lawful order or direction issued by the Registrar under this Act or the Rules. Provision is made for winding up of the society by section 85 of the Act. It will thus be seen that under the scheme of the Act, the general body is to elect the members for the committee and the term of office of an elected member of the committee shall be three years, subject to the provision of one-third

of its members to retire annually. Power is given to the Registrar to supersede co-operative societies and for taking up winding up proceedings. There is no provision in the Act for passing any no-confidence motion against any of the members of the co-operative society. The powers of the general body is enumerated in section 26 (2) of the Act. But, it does not include power to remove the members of the committee.

Societies which were registered before the coming into force of Act LIII of 1961 are governed by the provisions of its bye-laws, so far as the same are not inconsistent with the express provisions of this Act. Sillumarathupatti Co-operative Agricultural Bank, Ltd. was registered before this Act came into force and therefore the bye-laws of the society in so far as they are not inconsistent with the express provisions of the Act continue to be in force. The bye-laws of this society provide for removal of the Board of Directors. Bye-law 20 (1) provides that all the members of the Board of Directors shall be elected at one and the same time for a specified period of three years and that it shall be competent to the general body to remove at any time any elected member of the Board of Directors and elect another in his place, and the member so elected shall hold office only for the unexpired portion of the original period. Bye-law 31 provides that the general body shall meet from time to time at least once a year to conduct the work of the bank, and that the general body shall not interfere with the actions of the Board of Directors done in the exercise of powers conferred on them by the bye-laws. Amongst other matters, the general body may conduct the election and removal of the Board of Directors. Bye-law 35 prescribes the procedure for giving notice regarding a general body meeting. It is also provided that any irregularity in the service of the notice shall not invalidate the proceedings. The general body shall be convened by a resolution of the Board of Directors. While under section 26 (2) of the Act, a general body meeting is to be held once in a year and special general body meeting is to be requisitioned in the manner provided in section 26 (3) (*a*), the bye-laws of the society provide for the general body to remove any elected member of the Board of Directors and to elect another in his place. The Board of Directors can be removed under bye-law 31. The power to remove a member of the committee or Board of Directors is provided in the bye-laws of the society, though it is not found in the provisions of the Act. As the bye-laws of the society were registered before 1961, they continue to be in force, unless they are shown to be inconsistent with the express provisions of the Act. The provisions relating to the removal of the members cannot be said to be invalid, as they can only be said to be additional provisions and cannot be said to be inconsistent with the provisions of the Act. Therefore, the bye-laws which empowers the general body of this society to remove any elected member or Board of Director or any 1 ember of the committee cannot be said to be invalid.

The question that remains to be considered is whether the general body meeting was properly convened and if so, whether the election of the new members could be conducted without observing the provisions of rule 30 of the Madras Co-operative Societies Rules, 1963. Section 65 of the Act empowers the Registrar to hold an enquiry by himself or to direct some person authorised by him in writing in this behalf to hold an enquiry into the constitution, working and financial condition of a registered society. The scope of the enquiry by the officer so directed is to enquire into the constitution, working and financial condition of the registered society. The Registrar or the person authorised by him is given powers which are enumerated in sub-section (2) clauses (*a*) to (*d*) of section 65. After an enquiry, the Registrar is enjoined to communicate the result of the enquiry to the persons concerned. The Registrar is also empowered to direct any officer of the society to take such action as may be specified in the order to remedy the defects, if any, disclosed as a result of the enquiry. The powers that are conferred on the Registrar and the person authorised for the purpose of enquiry are to have free access to the books, accounts, documents, securities, cash and other properties belonging to, or in the custody of, the society and to summon any person in possession of, or

responsible for the custody of any such books, accounts, documents, securities, cash or other properties to produce the same. They are also authorised to seize the books accounts and documents of the society for the purpose of the enquiry. They may summon any person and examine him on oath and direct him to produce books, accounts and documents in relation to the transactions of the society. The sub-section on which reliance is placed by the respondents as empowering the enquiring officer to call for a general body meeting is sub-section (2), clause (*d*) of section 65 of the Act. Sub-section (2) (*d*) (i) reads as under :—

> "He may, notwithstanding any rule or bye-law prescribing the period of notice for a general meeting of the society or for a meeting of the committee, require any officer or officers of the society to call a general meeting or a meeting of the committee at such time and place at the headquarters of the society or any branch thereof to consider such matters as may be specified by him and the provisions of sub-clauses (i) and (ii) of clause (*b*) of sub-section (4) of section 26 shall apply to any meeting called under this sub-clause as if it were a meeting called in pursuance of a requisition under clause (*a*) of sub-section (3) of that section ;"

Sub-section (2) (*d*) (ii) of section 65 may be extracted as under :—

> " If the officer or officers of the society refuses or refuse or fails or fail to call such meeting or if in the opinion of the Registrar, there is no committee or officer or officers competent under this Act, the rules or the bye-laws to call such meeting, or if there be a dispute regarding the competence of the committee, officer or officers to call such meeting the Registrar or the person authorised by him under sub-section (1) shall have power to call the meeting himself and the provisions of clause (*b*) of sub-section (4) of section 26 and sub-section (5) of that section shall apply to such meeting as if it were a meeting called under clause (*a*) of the said sub-section (4) ".

Sub-section (2) (*d*) (i) empowers the enquiring officer to call a general meeting or a meeting of the committee at such time and place at the headquarters of the society or any branch thereof to consider such matters as may be specified by him. The power is conferred on the enquiring officer notwithstandng any rule or bye-law prescribing the period for a general meeting of the society. Clause (*d*) (i) of sub-section(2)of section 65 therefore dispenses with the requisite notice for a general body meeting which the enquiring officer requires an officer or the society to call for. In the event of the officer of the society refusing or failing to call such a meeting, or if there is a dispute regarding the competence of the committee, the officer is empowered to call a general body meeting. The Registrar is also empowered to call a general body meeting, if there is no committee or officer or officers competent under this Act, the Rules or the bye-laws to call such a meeting.

The powers conferred on the Registrar or on the enquiring officer to call for a general body meeting under sub-sec ion (2) (*d*) (ii) are after the failure of the officer or officers of the scoiety to call such a meeting required to be convened under sub-section (2) (*d*) (i). It is admitted that in this case the enquiry officer did not require any officer or officers of the society to call for a general body meeting as required in section 65 (2) (*d*) (i). The power of the enquiry officer flows from the refusal of the officers of the society to call such a meeting and when the enquiry officer had failed to require the officer or the officers of the society to call such a general meeting, the enquiry officer will have no power to act under sub-section (2) (*d*) (ii). The contention of the learned Counsel for the respondents that the provision is only directive in nature cannot be accepted.

It is submitted that the powers conferred on the Registrar and the person is authorised to conduct an enquiry are only for the purpose of holding an enquiry into the constitution, working and the financial conditions of the registered society and the provisions relating to the calling of a general body meeting can only be for any one of the purposes mentioned in the section, *viz.*, for holding an enquiry into

the constitution, working and financial condition of the registered society. The submission is that the calling of the meeting for the purpose of removal of the existing directors or for election of fresh directors is not for the purpose of holding an enquiry into the constitution, working and financial condition of the registered society. Section 65 read as a whole supports the contention of the petitioner. The scope of the enquiry is regarding the constitution, working and financial condition of the registered society. The power conferred in sub-section (2), clauses (*a*), (*b*) and (*c*) are intended to enable the officer to discharge his duty. Sub-section 2 (*d*) can only be construed as the officer being conferred with a power to convene a general body meeting to enable him to conduct the enquiry into the constitution, working and the financial condition of the registered society. After the enquiry is completed, the Registrar is required to communicate the result of the enquiry to the concerned authorities and he is also empowered to require the society to rectify the defects. The convening of a general body meeting for the purpose of removing or electing new members appears to be outside the scope of the enquiry contemplated under section 65 of the Act. The powers of the general body include the approval of the budget for the ensuing years, the consideration of the audit report and the annual report and for submission of returns that may be prescribed by the State Government. These may be some of the purposes for which a general body meeting could be convened by the officer under section 65 of the Act.

The election of the respondents is also questioned on the ground that rule 30 of the Madras Co-operative Societies Rules, 1963, which specify the procedure regarding the election of the members of the committee had not been complied with. Rule 30 prescribes the procedure for the election of members of the committee of a society not falling under rule 29. It is admitted that rule 29 is not applicable to the facts of this case and that the rule applicable is only rule 30. Rule 30 requires that the election shall be held at a general meeting of the society specially convened for the purpose, for which not less than seven days' clear notice shall be given to the members. The rule makes detailed provisions regarding the form of notice, the provision for nomination, scrutiny, counting of votes and declaration of result. Rule 30 (6) requires that in the case of a contest, there shall be a poll. Rule 30 (16) provides for the appointment of an election officer by the Registrar of Co-operative Societies. Section 27 (4) of Act LIII of 1961 provides that the election of members of the committee shall be by ballot in such manner as may be prescribed, provided that a casual vacancy shall be filled in the manner specified in the rules or the bye-laws. While rule 30 prescribes the procedure, the bye-law is silent about it. While bye-law 20 (1) empowers to general body to remove any elected member of the Board of Directors and elect another in his place, the procedure for such an election is not given in the said bye-laws. So also bye-law 31 (1) empowers the general body to elect the Board of Directors; but the procedure for such an election and removal is not provided in it. Bye-law 35 prescribes that ordinarily three days' notice shall be given to members before a meeting of the general body is convened. As already pointed out, section 27 (4) provides that election of the members of the committee shall be by ballot, except in the case of filling up of casual vacancy which could be filled in the manner as may be specified in the rules or the bye-laws. As the bye-laws have not prescribed the procedure and as the rules have laid down the procedure, the election should be conducted in the manner prescribed in the rules. The mere fact that the bye-laws are continued under section 114 of the Act, will not make rule 30 inapplicable for such elections. Further, the bye-law only provides that ordinarily three days notice shall be given to members before a meeting of the general body is convened. But rule 30 specifically provides that seven days' clear notice should be given for an election meeting. The requirements under the rules will have to be complied with. There being no conflict between the bye-laws and the rules, the bye-laws being silent about the procedure, the procedure prescribed by the Rules will have to be followed. As admittedly seven days' clear notice as required by the Rules, and the procedure laid down, have not been followed, even if the meeting had been validly convened, the election of the new members of the

co-operative society would be invalid and opposed to law. In this view of the matter, it is not necessary to consider the submission made by the learned Counsel for the petitioner that in fact no election was held on that day and that the respondents were declared elected on improper grounds.

Relying on section 115 of the Act, learned Counsel for the respondents submitted that no act of the registered society shall be deemed to be invalid due to any defect or irregularity in the election. The submission is that even though it might be held that the enquiry officer was not empowered to convene a general body meeting and even though the rules relating to the elections had not been followed, as the election of the respondents was an act by the registered society, it shall be deemed to be valid as the defect and the irregularity in the election complained of cannot invalidate the election. This contention cannot be accepted as the meeting was convened by a person who had no auhority to convene and without giving proper notice as required in the rules. The general body meeting convened will not be a properly convened general body meeting and the acts and omissions complained of will vitiate the entire proceedings, as they are not mere defects or irregularities in the election.

Mr. Venugopal, the learned Counsel for the respondents, submitted that even if all the points are found againts him on merits, the Writ Petition will have to be dismissed on the ground that a writ of *quo warranto* against the members of a co-operative society is not available, as the members of the committe cannot be said to be holding a public office. He further submitted that as the co-operative society is a registered society, the petitioner cannot mainatain a writ unless the writ was filed by the society or by the entire body of directors. The last contention was that the petitioner has a remedy by way of an appeal as provided for under the Act and this Court should not interfere in writ proceedings.

The objection to the issue of a writ of *quo warranto* on the ground that the office of a member of a committee under the Madras Co-operative Societies Act, 1961 is not a public office, need not be gone into, for, the relief asked for in Writ Petition No. 2908/66 is for the issue of writ of *mandamus* or such other writ as the Court may deem fit and proper against the respondents directing them to admit the petitioner and others mentioned in the petition as members to the office of the committee. Though in Writ Petition No. 2732 of 1966 the relief asked for is for the issue of a writ *quo warranto*, the prayer is also for the issue of an appropriate writ or order. Though the prayer might have been for the issue of a writ of *quo warranto* or a writ of *mandamus* the Court is entitled to grant relief which is appropriate taking into consideration the facts of the case. On the facts, it is clear that the enquiry officer was not empowered to call for the general body meeting and that the general body meeting was not properly constituted and the proceedings of the general body is therefore liable to be quashed. The appropriate order will, therefore, be to quash the entire proceedings of the general body meeting. In this view of the matter, it is unnecessary to go into the question whether a writ of *quo warranto* should issue.

The next contention of the learned Counsel for the respondents is that the petitioner cannot himself maintain a writ, and the co-operative society is a registered society and the petition should have been filed by the entire body of directors. In support of this contention, the learned Counsel relied on the decision in *Durayappah* v. *Fernando and others*[1]. In the case cited the Minister of Local Government directed the Commissioner of Local Government to inquire into the allegations against the Jaffna Municipality. The Commissioner did not ask the Mayor of the Municipality any questions or give any opportunity to any of its members to express their views. He made his report, and the Minister directed the Municipal Council to be dissolved and superseded. The Mayor, took up proceedings for quashing the order of the Government superseding the Municipal Council. It was held that though the order

1. (1967) 2 All E.R. 152.

of the Minister could have been held void *ab initio* in an action by the Council, yet it was so voidable only at the election of the Council, and it was not a nullity. The Privy Council held that though the Mayor was not representing the Council in the proceedings and it was not shown that the Council could not have been the petitioner, he was not entitled to complain of the order and could not maintain the proceedings. The order that was complained was for the supersession of the Municipal Council. But the Council had not complained. Though the appellant was the Mayor at the time of the dissolution of the Council, it was held that he did not have any right to complain independently of the Council. The reason given was that the appellant must show that he is representing the Council or that by reason of circumstances, the Council could not have been the plaintiff. The Jaffna Municipal Council in that case was a corporate body having its own seal, and was capable of taking action. In this case, the society is registered under the Co-operative Societies Act. The society is governed by the provisions of the Madras Co-operative Societies Act. Further the Co-operative Society has not been as a body dissolved or superseded. But in an election purported to have been held by the general body, the members of the society had been removed and new members had been elected. Any member of the society who had been removed, if aggrieved, is entitled to question the correctness of his removal in the election. The decision cited which related to the supersession of a Municipal Council, which is a corporate body, will have no application to the present case..

Lastly it was submitted that as the general body had passed a resolution removing the petitioner and others and electing the respondents, the petitioner should have pursued his remedies under the Madras Co-operative Societies Act by preferring an appeal, and not approach this Court by way of writ proceedings. It is true that the petitioner has an alternative remedy. But that alternative remedy could not be had without great inconvenience and prejudice to the petitioner. The fact that an alternative remedy is available would not deprive this Court of its power to issue a writ. In this case, *prima facie*, the act of the enquiry officer in convening the general body meeting and the proceedings of the general body meeting are without jurisdiction and therefore the proceedings are invalid. Taking all these circumstances into consideration, I am satisfied that the relief by way of writ proceedings should not be denied to the petitioner.

In the result, the contentions of the learned Counsel for the respondents are rejected. The appropriate directions that should issue in the two writ petitions is that the enquiry officer had acted without jurisdiction in convening the general body meeting and that the proceedings of the meeting are not valid. In the result the proceedings are quashed. The writ petitions are accordingly allowed with costs against respondents 1 to 8. Counsel's fee Rs. 250 (consolidated).

V.K. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE M. NATESAN.

S. Kuppuswami Chettiar, Proprietor, Krishnananda Rice Mill, South Arcot .. *Petitioner**

v.

Smt. Kamalammal and another .. *Respondents.*

Rice Milling Industry (Regulation) Act (XXI of 1958), section 5—Grant of permit under, overruling objections by an existing rice mill-owner—Order granting permit ex facie *not giving reasons for the grant—Grant of permit if becomes vitiated.*

The object of the Rice Milling Industry (Regulation) Act is not to give monopoly in rice mill trade to a few but to regulate the rice milling industry in

* W.P. No. 1833 of 1964. 30th March, 1967.

the interests of the general public and the grant of a permit is made when in the opinion of the Central Government it is necessary to grant the permit for ensuring adequate supply of rice. That being the true position one can say that it will be incumbent on the authority to give reasons when a permit is refused. But when a permit is granted, it follows that the objections to the grant of permit, if any, had been overruled and the necessary requisites for the grant are present. There is no ground for the contention that in such circumstances also *ex facie* the order, for the benefit of an existing mill-owner-objector, to whom the statute does not even provide notice in the matter, must give reasons and that in the absence of reasons on the face of the order it is vitiated.

In the instant case it may be that the actual grant of a permit for establishing a rice mill does not specify the reasons. But the record of the case amply bears out that every requirement for the grant of a permit as contemplated and provided for under the Act and the rules has been observed. The order on the merits cannot therefore be challenged.

Nor has the objection any force that the licensing authority had allowed itself to be directed by a communication from the Board of Revenue. The instructions are for securing to the ultimate administrative adjudicator the relevant materials from the locality and contain expertise and technical guidance for gathering of statistics. There is nothing in it which can be regarded as a fetter. A tribunal may use the technical and local knowledge and the accumulated expertise to draw an inference. It is not like a Court bound by strict rules of evidence.

Quaere : Whether proceedings relating to the grant of a permit under the Rice Milling Industry (Regulation) Act are administrative in character not amenable to a writ of *certiorari* and whether an existing rice mill-owner has *locus standi* to maintain an application for *certiorari* against the grant of a permit.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order of the Commissioner for Land Revenue, Food Production and Civil Supplies, Board of Revenue, Madras, the 2nd respondent herein, B.P. Rt. No. 464 of 1964 (C.S.) and quash the order dated 26th August, 1964 and made therein.

K. K. Venugopal, for Petitioner.

K. Parasaran, for 1st Respondent.

The Assistant Government Pleader, for 2nd Respondent.

The Court made the following

ORDER.—The petitioner herein seeks to get quashed by a writ in the nature of *certiorari* the grant of a permit for the establishment of a rice mill to the first respondent by the second respondent, the Commissioner of Civil Supplies, under section 5 of the Rice Milling Industry (Regulation) Act, 1958.

The petitioner is running a rice mill in Semmedu village, Gingee Taluk, South Arcot district, since 1962. The first respondent, wife of the erstwhile partner of the petitioner, applied for permit under the Act for establishing a new rice mill in R.S. No. 208/3 of the said Semmedu village. The application was made on 13th November, 1963. The petitioner herein preferred objections, in the main asserting that location of a new mill would affect his business, that there was not enough paddy available in the area to feed the new rice mill besides providing for the existing rice mills in the area, that in the locality hand pounding was widely prevalent, and that rarely large quantities of paddy were brought to the mills for hulling. The petitioner's rice mill was about 1½ miles off the site of the proposed rice mill of the first respondent and notwithstanding the objections of the petitioner, permit for a rice mill was granted. The petitioner questions the validity of the grant urging that the proceedings are quasi-judicial in character, and that the order in question has

not given any reasons for the grant of the permit. The failure to set out any reason in the order, according to the petitioner, by itself vitiates the order. The order does not show that the authority granting the permit had taken into consideration the relevant matters under the provisions of the Act before granting it. It is pleaded that if the second respondent had applied his mind to the various objections raised by the petitioner, he would have been forced to come to the conclusion that there was no necessity for another rice mill in the area. The affidavit in support of the petition sets out location of two other existing rice mills in the area—one at about a mile from the suit village and another rice mill, Venkateswara Rice Mill, about 6 furlongs from the petitioner's rice mill.

In the counter-affidavit of the first respondent, besides meeting the objections of the petitioner to the grant of permit, on the merits it is pleaded that the grant of a permit to the first respondent does not affect the personal or individual rights of the petitioner for him to invoke the jurisdiction of this Court under Article 226 of the Constitution, and that the petitioner has no legal right to prevent another person from carrying on business by establishing a rice mill. It is emphasised that the first respondent has a fundamental right to carry on business subject to reasonable restrictions and the provisions of the Act in question are intended only to regulate the running of mills in the interests of the public and not for creating a vested interest or monopoly in favour of the petitioner. The first respondent would state that the Venkateswara Rice Mill was at a distance of more than two miles from the proposed mill and the mill at Satyamangalam at a distance of more than three miles.

On behalf of the second respondent, the Additional Assistant Secretary to the Commissioner of Civil Supplies has filed counter-affidavit. A perusal of the counter-affidavit makes out that all the requirements of the Rice Milling Industry (Regulation) Act and the Rules thereunder have been borne in mind when ordering the grant. The requisite investigation provided for under section 5 is stated to have been carried out. Section 5 (4) of the Act requires a full and complete investigation to be made in the manner prescribed before the grant of a permit. The investigation should have due regard to the number of rice mills operating in the locality, the availability of paddy in the locality, the availability of power and water supply for the rice mill in respect of which permit is applied for, types of the rice mill—the huller type, sheller type or combined sheller-huller type-whether the functioning of the rice mill would cause substantial unemployment in the locality and similar relevant particulars. The authority has to be satisfied that it is necessary to grant the permit for ensuring adequate supply of rice. The rules made under the Act bring out more clearly the object of the regulation. Information has to be gathered as to the pattern of trade and commerce in rice in the locality, the necessity or otherwise for an addition to the productive capacity of the existing rice mills in the locality, whether hand pounding industry in the locality is already well organised and whether the establishment of a new rice mill is likely to affect adversely that industry. The counter-affidavit filed on behalf of the second respondent states that the site in question was approved by the District Health Officer, and that the Special Deputy Registrar of Co-operative Societies, Cuddalore, the Deputy Registrar of Co-operative Societies, Tirukoilur, and the Village Industries Officer, Cuddalore, reported that they had no objection to the grant of a permit to the first respondent. It is stated that a report was called for from the District Revenue Officer, South Arcot, on the objections of the petitioner herein, and that after a careful consideration of the contentions of the petitioner herein and the report of theDistrict Revenue Officer the objections of the petitioner were overruled and the permit issued to the first respondent. The counter-affidavit sets out *in extenso* the particulars which the investigation provided for under section 5 (4) of the Act has brought out. It is stated that sufficient surplus of paddy would be available for establishment of additional rice mill in the locality. The Village Industries Officer, Cuddalore, had reported that there was no hand pounding industry in the locality and that there was no possibility of starting a new

one in the near future. The objections of the petitioner were found on the merits untenable and were not borne out by the facts and figures gathered.

The main endeavour of Mr. K. K. Venugopal, learned Counsel appearing before me, was to persuade me to refer the matter to a Bench, as there were conflicting views on two of the questions raised for the respondents. Learned Counsel contended that apart from the merits, two objections were raised by the respondents (1) that the proceedings relating to the grant of a permit were administrative in character and therefore a writ of *certiorari* did not lie; and (2) that the petitioner being only an existing rice mill-owner had no legal interest to maintain an application for *certiorari* and he should not be considered to be a person aggrieved by the grant. Learned Counsel urged that on both these points differing views have been expressed by learned Judges of this Court. My attention was drawn to the decision of Kailasam, J. in *Kuppuswami Pillai* v. *The State of Madras, etc.*[1], where the learned Judge posing for consideration the question whether an existing rice mill-holder is entitled to be heard by the authority in granting a new permit to another person in the locality and whether the order was quasi-judicial in nature, on a consideration of the authorities, has held that an existing rice mill-holder would not be an aggrieved person entitled to maintain a writ petition challenging the grant of a new permit in the area. The learned Judge is also of the view that as there was no provision in the Act for enabling an existing rice mill-holder to make representations or to be heard and as his rights are not affected, the function of the licensing authority cannot be described as quasi-judicial one. The learned Judge has referred in this connection to *Lakshmi Ammal* v. *Vaithilingam*[2], where the Division Bench observed :

" Further we are by no means satisfied that by granting the licence to the first respondent any right of the appellant had been affected so as to entitle him to approach this Court by way of a writ of *certiorari.*"

In *Lakshmi Ammal* v. *The Commissioner for Land Revenue*[3], Veeraswami, J., has followed the above Division Bench decision and observed that an existing rice mill-owner has no interest to sustain an application for *certiorari* to quash an order granting permit. Veeraswami, J., in rejecting the application for *certiorari* did not go into the merits of the case. This judgment of Veeraswami, J., went up in appeal and in the appeal *Lakshmi Ammal* v. *The Commissioner for Land Revenue and Civil Supplies*[4], the question of maintainability of the writ by the petitioner was not discussed, the Bench going into the merits of the case and finding against the petitioner on the merits. The learned Judges observed :

" The learned Judge declined to entertain the writ petition on the short ground that the appellant could not be deemed to be a person aggrieved so as to entitle he, to approach this Court for the issue of a writ. The conclusion reached by the learned Judge can, in our opinion, be supported on the merits of the case as well."

But in *Abdul Mazid* v. *The State of Madras*[5], Rajagopalan, J. has taken the view that the petitioner who had lodged his objections which had been considered by the Government before overruling them and making the grant would be a person aggrieved by the decision of the Government and could invoke the jurisdiction of this Court under Article 226 of the Constitution for the issue of a writ of *certiorari*. The learned Judge also held that the order in such a case was not solely administrative in character. Rajagopalan, J., in taking that view referred to the observations of the Supreme Court in *Raman & Raman Ltd.* v. *Government of Madras*[6], under the Motor Vehicles Act where it was observed:

"..........it may be said that a person has the fundamental right to carry on his business of plying buses and therefore has the right to have the statutory

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1. W.P. Nos. 2332, 2854 etc. of 1966.
2. W.A. No. 195 of 1962.
3. W.P. No. 1091 of 1962.
4. (1965) 1 M.L.J. 119 at 120 : I.L.R. (1964) 2 Mad. 869.
5. (1957) 2 M.L.J. 1 at 4 : (1957) M.L.J. (Crl.) 263 : I.L.R. (1957) Mad. 845.
6. (1956) 1 M.L.J. (S.C.) 169 : (1956) S.C.J. 368.

functions of those authorities properly exercised in which case they would be quasi-judicial functions."

Learned Counsel referred to the decision of a Division Bench in *Thangavelu* v. *The Commissioner of Land Revenue*,[1] to which I was a party, where when considering a similar contention under the Madras Cinemas (Regulation) Act we held that the function of the licensing authority is quasi-judicial in character. We had there referred to the passage in *Raman and Raman Ltd.* v. *Government of Madras*[2], already extracted and the decision of this Court in *C. S. S. Motor Service* v. *Madras State*[3]. We took the view that where a fundamental right is involved as in the case of a trade, business or vocation, the proceeding of a Tribunal regulating the same under the statutory powers would be quasi-judicial in character. The party affected would have the right to see that the statutory functions of the Tribunal are properly exercised. In *Ramanathan Chettiar* v. *Board of Revenue*[4], a case under the Rice Milling Industry (Regulation) Act, Veeraswami, J., held that the mere fact that sub-section (4) of section 5 directs the licensing authority to take into account certain specified matters does not mean that for that reason its jurisdiction is quasi-judicial in character. The learned Judge has purported to follow the decision in *Lakshmi Ammal* v. *Vaithilingam*[5], in preference to the one in *Abdul Mazid* v. *The State of Madras*[6]. In this context Mr. K. K. Venugopal referred to the Full Bench decision of this Court in S. *M. Transport* v. *Raman and Raman*[7], where this Court had to consider when a person could be said to be aggrieved for the purpose of *certiorari* under the Motor Vehicles Act. It is true that as contended for the petitioner differing views have been expressed, on the two objections put forward to the maintainability of the writ petition. But I do not think that on the facts of the present case there is need to refer the matter to a Division Bench.

Taking it for granted that the petitioner is a person aggrieved who could maintain his application for *certiorari*, and proceeding also on the assumption that the function of the second respondent in the grant of the permit is quasi-judicial in nature, to what this would lead to so far as the petitioner is concerned on the facts of this case? On the second premise it is contended for the petitioner first that the absence of any reason on the face of the order without more, would vitiate the order. Secondly an additional ground is sought to be raised that the second respondent has, in arriving at his conclusion, allowed his quasi-judicial determination to be guided and fettered by executive directions issued by the Board of Revenue for determination of availability of paddy and adequacy of the existing rice mills. The basis for this ground is admittedly the averment in the counter-affidavit filed on behalf of the second respondent of the yardstick prescribed by the Board of Revenue for evaluating the production of paddy in the locality.

In support of his first contention learned Counsel for the petitioner cites *Harinagar Sugar Mills* v. *Shyam Sundar*[8], where the Supreme Court in a case arising under the Companies Act, 1956, with reference to the determination by the Central Government exercising appellate powers, observed that as the Central Government acts as a Tribunal exercising judicial powers and the exercise of that power is subject to the jurisdiction of the Supreme Court, the power of the Supreme Court cannot be effectively exercised if reasons are not given by the Central Government in support of its order. But it should be noticed that the Supreme Court also observed:

" All the documents which were produced before the Deputy Secretary are not printed in the record before us and we were told at the bar that there were several other documents which the Deputy Secretary took into consideration.

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1. W.A. No. 135 of 1966.
2. (1956) 1 M.L.J. (S.C.) 169 : (1956) 1 An. W.R. (S.C.) 169 : (1956) S.C.J. 368.
3. (1952) 2 M.L.J. 894 : I.L.R. (1953) Mad. 304 : A.I.R. 1953 Mad. 279.
4. (1963) 2 M.L.J. 320 : I.L.R. (1964) 1 Mad. 151 : (1963) 76 L.W. 426.
5. W.A. No. 195 of 9162.
6. (1957) 2 M.L.J. 1 at 4 : I.L.R. (1957) Mad. 845 : (1957) M.L.J. (Crl.) 263.
7. (1961) 2 M.L.J. 127 : I.L.R. (1961) Mad. 110 : A.I.R. 1961 Mad. 180.
8. (1963) 1 S.C.J. 471 : (1962) 2 S.C.R. 487 : A.I.R. 1961 S.C. 1669 at 1678.

In the absence of anything to show that the Central Government exercised its restricted power in hearing an appeal under section 111 (3) and passed the orders under appeal in the light of the restrictions imposed by Article 47-B of the articles of association and in the interest of the company, we are unable to decide whether the Central Government did not transgress the limits of their power."

An inference may properly be made that if the records disclosed that the Central Government had acted within the restrictions and was alive to the materials it had to consider, the Supreme Court would not have interfered in the matter on the mere ground that the order itself did not contain reasons. Learned Counsel also cited *Govinda Rao* v. *State of M.P.*[1], for the position that reasons should appear on the determination whenever a Tribunal performs quasi-judicial functions. The Supreme Court in that case quashed an order which gave no reasons when rejecting an application for the grant of money or pension as maintenance under the C. P. and Berar Revocation of Land Revenue Exemption Act. These decisions are certainly authorities for the view that reasons must be found where a Tribunal functions in a quasi-judicial capacity. When the rights of a party are denied, he must know why he has been denied those rights or why his claim has been rejected. Can this requirement be postulated in favour of a person like the present petitioner with reference to a determination in which he is not entitled to any notice under the statute which governs that determination? No fundamental right of the petitioner is involved in this case except that the opening of rice mills is regulated in the interests of general economy and he would benefit by the absence of free competition. But for the Regulation the petitioner cannot contend even, that no other rice mill could be opened in the neighbourhood of his own rice mill to the detriment of his interest. Referring to the contention that natural justice would require notice to the existing rice mill owners in the locality having regard to commercial expediency and that profits of persons already running rice mills may not be upset, Jagadisan, J., in *Ramasundara Nadar* v. *State of Madras*[2], observed:

"Neither the express provisions of the statute and the rules, nor the legal implications flowing therefrom, nor even the scheme and pettern of the statute can afford any room for such contentions. The question of granting a permit for installation of a rice mill may be considered in the background of some policy relating to village economy, but individual rights can hardly have any place in such a consideration. There can be no question of violation of principles of natural justice because of lack of notice to the petitioner as the question is not whether petitioner's rights will or will not be affected but whether the necessary permits can be granted to the second respondent in accordance with the statutory provisions."

The object of the Act is not to give monopoly in rice mill trade to a few but to regulate the rice milling industry in the interests of the general public and the grant of a permit is made when in the opinion of the Central Government it is necessary to grant the permit for ensuring adequate supply of rice. That being the true position one can say that it will be incumbent on the authority to give reasons when a permit is refused. But when a permit is granted, it follows that the objections to the grant of a permit, if any, had been overruled and the necessary requisites for the grant are present. I see no ground for the contention that in such circumstances also *ex facie* the order, for the benefit of the objector to whom the statute does not even provide notice in the matter, must give reasons, and that in the absence of reasons on the face of the order it is vitiated. For the State, my attention was drawn to *M. P. Industrials Ltd.* v. *Union of India*[3], where the majority of the Court did not accept the broad contention that every order appealable under Article 136 of the Constitution must be a speaking order and omission to give reasons for the decision is by itself a sufficient ground for quashing it. Therein it was pointed out that an

1. (1966) 1 S.C.J. 480 : (1965) 1 S.C.R. 678 : A.I.R. 1965 S.C. 1222.
2. W.P. No. 644 of 1961.
3. (1966) 1 S.C.J. 204 : (1966) 1 S.C.R. 466 : A.I.R. 1966 S.C. 671.

order of an administrative Tribunal rejecting a revision application cannot be pronounced to be invalid on the sole ground that it does not give reasons for its rejection. The decision in *Harinagar Sugar Mills* v. *Shyam Sundar*[1], was explained as a case where apart from the fact that the Central Government reversed the decision appealed from without giving any reasons, the record produced before the Court did not disclose any apparent ground for the reversal. In *Ramanathan Chettiar* v. *Board of Revenue*[2], the learned Judge Veeraswami, J., after observing that it is not necessary in the case to express a final opinion as to the character of the jurisdiction of the authority functioning under section 5 of the Madras Rice Milling Industries (Regulation) Act, while observing that it is desirable that the authority should state reasons for its order where objections to grant of permit are made, has said that, that it is not to say that failure to give such reasons will necessarily affect the validity of the order. The learned Judge observed:

> " Where no reasons are given in an order, *prima facie* it is liable to be considered to be arbitrary. For that reason it may be necessary to issue *rule nisi* and call for the records so that this Court may be satisfied that the power under section 5 has been justly and reasonably, and not arbitrarily exercised........"

The learned Judge examining the records, found that investigation was made into the specified matters that the authority was satisfied that there was enough surplus paddy in the neighbourhood to justify the issue of the permits in question, and that the objections of the petitioners in that case were duly taken into consideration before they were overruled.

As stated at the outset, the record in the present case amply bears out that every requirement for the grant of a permit as contemplated and provided for under the Act and Rules has been observed. The necessary data and statistics have been examined and the objections put forward by the petitioner have been taken into consideration and examined before they were overruled. It may be that the actual grant does not specify the reasons. But the record shows that the total production of paddy in the locality has been taken into consideration, milling capacity of the existing mills noticed and it was also found that there was a surplus necessitating location of a new rice mill in the locality. There was no hand-pounding industry in the locality which would be affected by the introduction of the rice mill. The order on the merits cannot therefore be challenged.

The second objection that the second respondent as a quasi-judicial tribunal has allowed itself to be directed by a communication from the Board of Revenue is again devoid of substance. The instructions in question issued by the Board of Revenue for the District Officers for future guidance are not issued under any statute or rule. The communication has no statutory basis and is merely a work-sheet. It does not purport to fetter the discretion of the officers in their functions under the Act. It is not addressed to the authority that has to order the grant. These instructions to the District Officers give guidance in the matter of gathering the necessary data and figures which have to be considered before making the grant. The instructions are for securing to the ultimate administrative adjudicator the relevant materials from the locality and contain expertise and technical guidance for gathering of statistics. For instance the average paddy yield that may be expected with reference to the acreage in respect of the single crop wet land, dry land, etc. is shown there. The instructions themselves point out that the figures may be adopted normally but the actual yield should be adopted if conditions vary widely. I find nothing in these instructions which can be regarded as fetters on the exercise of quasi-judicial functions. A tribunal may use the technical and local knowledge and accumulated expertise to draw an inference. It is not like a Court bound by strict rules of evidence. Learned Counsel could not point out any particular instruction which would affect a quasi-judicial determination in accordance with the provisions of the Act and Rules in an unwarranted or

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1. (1963) 1 S.C.J. 471 : (1962) 2 S.C.R. 487 : A.I.R. 1961 S.C. 1669.

2. (1963) 2 M.L.J. 320 : I.L.R. (1964) 1 Mad. 151 : (1963) 76 L.W. 426 at 427.

illegal manner so as to vitiate it. If follows that the writ petition is devoid of merits and it is dismissed with costs to be shared by the two respondents. Counsel's fee Rs. 100.

V.K. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE T. RAMAPRASADA RAO.

Amaravathi Ammal .. *Petitioner**

v.

Periyanayagammal .. *Respondent.*

Oaths Act (X of 1873), *section* 11 *and Civil Procedure Code (V of* 1908), *section* 11—*Witness on challenge, taking oath in a suit—Effect of, in subsequent proceeding—Whether conclusive and would be* res judicata *in subsequent proceeding.*

No question of *res judicata* as such arises in the present proceedings. The respondent figured in the earlier suit only as a witness.

Section 11 of the Oaths Act read by itself may appear to be wider in its effect: but its scope has got to be limited by its context. Sections 8 and 9 clearly refer to particular proceedings and there is no reason why section 11 should be read as having reference to proceedings other than those contemplated by sections 8 and 9.

Following the view expressed in *Keshava* v. *Rudran*, (1882) I.L.R. 5 Mad. 259, *Ranganatha Iyer* v. *Jayavelu Mudaliar*, (1940) 1 M.L.J. 685; *Sanyasi Baritya* v. *Arteswaro*, (1906) I.L.R. 33 Cal. 386, it was held that the conclusiveness contemplated by section 11 is confined only to the particular proceeding in which the oath taking took place. It may be that the oath taken in the earlier litigation, which should be conclusive against the challenging party, may be evidence in the subsequent proceeding; only it will not be conclusive evidence. That means, the Court in subsequent proceedings will be at liberty to weigh the effect of the fact of the earlier evidence on oath.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the order of the District Munsif of Vridhachalam in S.C. No. 1730 of 1962.

R. Sundaralingam, for Petitioner.

T. V. Balakrishnan and *N. Vanchinathan*, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, J.—This Civil Revision Petition comes before us, as Venkatadri, J., thought there was divergence of authority on a certain point relevant to the case.

The petitioner had executed a promissory note in favour of the respondent who assigned it to a third party. In the suit instituted by the assignee of the promissory note, the petitioner challenged the respondent who figured as a witness to take oath and deny that the debt under the promissory note had been discharged. The respondent took oath to that effect which the Court naturally accepted, with the result the suit was decreed. The present suit, out of which the Civil Revision Petition arises, has been instituted by the petitioner against the respondent to recover from him the amount covered by the earlier decree. The suit was resisted on the ground that it was barred by *res judicata*, in view of the oath taken in the previous proceeding. This ground was accepted and the suit was dismissed. When the Civil Revision Petition came before Venkatadri, J., in the first instance, his attention was invited to *Keshava* v. *Rudran*[1], *Sanyasi Baritya* v. *Arteswaro*[2], and *Ranganatha Iyer* v. *Jayavelu Mudaliar*[3], and in view of the conflict of decision on the question of

* C. R. P. No. 1184 of 1963. 24th August, 1967.

1. (1882) I.L.R. 5 Mad. 259.
2. (1913) 24 M.L.J. 321: (1913) I.L.R. 36 Mad. 287.
3. (1940) 1 M.L.J. 685.

res judicata, he thought it desirable that the question should be decided by a Division Bench.

We are of opinion that no question of *res judicata* as such arises in the present proceedings. The respondent figured in the earlier suit only as a witness. The difference of opinion between *Keshava* v. *Rudran*[1], and *Ranganatha Iyer* v. *Jayavelu Mudaliar*[2], on the one hand and *Sanyasi Baritya* v. *Arteswaro*[3], on the other was on the effect of the decision in the earlier suit based on evidence on oath given by a party to the litigation from the standpoint of the applicability of the rule of *res judicata*. In *Keshava* v. *Rudran*[1], Turner, C. J. and Kindersley, J., were of opinion that a decision based upon the oath of a party was not an adjudication by the Court on an issue, which would operate as an estoppel in future proceedings. The learned Judges observed:

> " The oath having been taken, the Court is constrained to accept the statements of the deponent as true and cannot exercise its judgment in this matter. It would be highly dangerous to regard the decision of an issue so arrived at as an adjudication, operating as an estoppel in any future proceedings. The terms of the Act indicate that the party consents to be bound only in respect of the subject-matter of the pending proceedings."

Benson, J., and Sundara Aiyar, J., in *Sanyasi Baritya* v. *Arteswaro*[3], however took a different view:

> " The decision of any matter directly and substantially in issue in a former suit between the same parties would nonethelses be *res judicata* because the decision was based on the oath of one of the parties or a witness in the former suit."

The learned Judges thought that even in such a case, the result was an adjudication by a Court of the contest and that the effect of taking oath was merely to furnish conclusive evidence on the matter to which it related. On that view, they found it difficult to see why the principle of *res judicata* should not be applicable to the decision given by the Court, simply because the evidence or part of the evidence on which it was based was furnished by the oath taken. They also considered that there was nothing in any of the sections of the Oaths Act limiting the effect of the evidence given on oath to the subject-matter of the pending proceedings. King, J., in *Ranganatha Iyer* v. *Jayavelu Mudaliar*[2], preferred to follow *Keshava* v. *Rudran*[1]. As we mentioned, in all these cases the contest was between the same parties as in the earlier suit.

On the question as to what precisely is the effect of the conclusiveness of the evidence under section 11 of the Oaths Act in subsequent proceedings between the parties one of whom was not a party to the earlier litigation we are of opinion that the conclusiveness is confined to the proceedings in which the oath-taking took place. Section 11 of the Oaths Act read by itself may appear to be wider in its effect, but we consider that its scope has got to be limited by its context. Sections 8 and 9 clearly refer to particular proceedings and there is no reason why we should read section 11 as having reference to proceedings other than those contemplated by sections 8 and 9. Our understanding the three sections, particularly of section 11 in the context accords with the preponderating judicial view in *Keshava* v. *Rudran*[1], *Ranganatha Iyer* v. *Jayavelu Mudaliar*[2] and *Badiaddin Ahmed* v. *Nizamuddin Naider*[4]. Though these cases were not concerned directly with the effect of oath-taking in subsequent proceedings between persons of whom only one was a party and the other was a witness in the earlier litigation in deciding the question of the applicability of the rule of *res judicata* they had to consider the scope of section 11 in the context of the preceding sections in the Oaths Act. We respectfully follow the view expressed in those cases and hold that the conclusiveness contemplated by

1. (1882) I.L.R. 5 Mad. 259.
2. (1940) 1 M.L.J. 685.
3. (1913) 24 M.L.J. 321 : (1913) I.L.R. 36 Mad. 287.
4. (1906) I.L.R. 33 Cal. 386.

section 11 is confined only to the particular proceeding in which the oath-taking took place. It may be that the oath taken in the earlier litigation which should be conclusive against the challenging party there may be evidence in the subsequent proceeding ; only it will not be conclusive evidence. That means, the Court in the subsequent proceedings will be at liberty to weigh the effect of the fact of the earlier evidence on oath.

On that view, the petition is allowed. The trial Court will proceed with the suit. There will be no order as to costs.

S.V.J. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

Public Prosecutor .. *Petitioner**

v.

P.C. Raju and others .. *Respondents.*

Imports and Exports (Control) Act (XXXIII of 1947), section 5 and Export (Control) Order (1962), clause 3—Export of the goods specified only in accordance with the licence granted by the Central Government or by any officer specified in Schedule II—Registrar of Co-operative Societies issuing instructions restricting the export to the produce of the grower members of the Co-operative Societies—The accused contravening the restrictions imposed by the Registrar—If an offence under the Act —Act concerned with permitting or prohibiting the export of certain goods—Imposition of restrictions by the Registrar outside the scope of the Act—Even the licensing authority not entitled to impose such restrictions—Condition 7 of the licence also not authorising the issue of such instructions—Instructions have no legal sanction—Conviction under the Act not sustainable.

Penal Code (XLV of 1860), sections 100, 177-A, 199, 467, 471 and 477-A—Falsification of accounts—Claim made only for chillies actually supplied—No contravention of the Imports and Exports (Control) Act, 1947 or any order made thereunder—No contravention of any of the conditions of licence—Accused not guilty of falsification of accounts—Declarations of the accused under section 199 of the Indian Penal Code.

Forgery—Charge of—Absence of satisfactory evidence—Accused not to be convicted.

The evidence in the case clearly bears out the conclusion that the major part of the chillies which were exported to Ceylon, were not the produce of the grower members of the various sales societies in Coimbatore district, but were purchased in Dindigul and Rajapalayam by P.W. 1 (approver) and accused 3 and exported to Ceylon, as though they were the produce of the grower members of the various sales societies in Coimbatore district. This act on the part of the accused was in contravention of the restrictions imposed by the Registrar of Co-operative Societies that those goods should be the product of the Co-operative Societies or the produce of the grower members of the Co-operative Societies.

Clause 3 of the Export (Control) Order, 1962, *inter alia* provided that save as otherwise provided in this Order, no person shall export any goods of the description specified.................. except under and in accordance with a licence granted by the Central Government or by any officer specified in Schedule II. In this case the export is under a licence granted by an officer specified in Schedule II. Section 5 of the Imports and Exports (Control) Act provided for penalty for contravention of any order made under the Act or any condition of a licence granted under such order. At the time of the commission of the act by the accused

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* Crl. R.C. No. 1711 of 1963, Crl. R.P. No. 1661 of 1963 and Crl. A. Nos. 451, 452, 453, 454, 464, 465, and 467 of 1963. 30th August, 1967.

the words " or any condition of a licence granted under any such order " was not in force. If the accused were otherwise punishable, the fact that these words were not part of section 5 at the time of the commission of the Act, would not make any difference and they would still be punishable.

The purpose of the Imports and Exports (Control) Act, so far as export is concerned, would only be either to permit or prohibit the export of certain goods. That those goods should be the product of the Co-operative Societies or the produce of the grower members is outside the scope of the Import and Export (Control) Act. Therefore, the restrictions of the kind, which the Registrar of Co-operative Societies sought to impose, cannot be imposed even by the licensing authority under the Export (Control) Order ; much less can it be done by the Registrar of Co-operative Societies. It is also obvious that condition 7 of the licence to the effect it does not exempt the exporter from any restrictions imposed by State Government or any of the officers under their control, does not enable either the State Government or the Registrar of Co-operative Societies to impose any conditions purported to be imposed by the latter. Therefore, the convictions of the appellants (accused) under Imports and Exports (Control) Act, 1947, cannot be sustained.

Regarding the charge of falsification of accounts, it is obvious from the evidence of the case that the claim was made only for chillies which were actually supplied though they may not be chillies which the various primary societies procured from their members and despatched from their respective places. Once it is held that there has been no contravention of the provisions of either Imports and Exports (Control) Act, 1947, or the Exports (Control) Order or any of the conditions of licence, the accused could not be held tobe guilty of offences under sections 177-A and 477-A read with section 100 of the Indian Penal Code.

In spite of the fact that the two declarations made by the accused (7 and 9) respecting the supply of the chillies are false, the accused could not be held guilty of offence under section 199 of the Indian Penal Code, because the declarations made by them were not declarations which any Court of Justice or any public servant or other person is bound or authorised by law to receive as evidence of any fact. Not only that. The instructions issued by the Registrar of Co-operative Societies having no legal force, there is no question of any public servant or other person being authorised by law to receive these declarations as evidence of fact.

Regarding the charges of forgery of a valuable security under sections 467 and 471 of the Indian Penal Code, in the absence of any satisfactory evidence whether accused 1 or 7 was responsible for making fictitious stamped acquittance, both of them could not be convicted.

All the appellants are entitled to be acquitted of all the charges on which they have been convicted.

Crl.R.C. No. 1711 *of* 1963:—Petition under sections 435 and 439 of the Code of Criminal Procedure,1898, praying the High Court to revise the Judgment of the Additional Sessions Judge of the Court of Session, Coimbatore Division at Coimbatore, dated 4th June, 1963 and passed in S.C. No. 83 of 1962.

C.A.Nos. 451 *to* 454, 464, 465 *and* 467 *of* 1963.—Appeals against the Judgment of the Additional Sessions Judge of the Court of Session of the Coimbatore Division at Coimbatore in the said Case No. 83 of the Calender for 1962.

T. Vanamamalai for *R. Kallappan* and *K. Sengottian, V. T. Rangaswami Ayyangar* for *R. G. Rajan* and *E. Ethirajulu, G. Ramaswamy, G. Gopalaswami* for *S. Sethuratnam* and *R. Kallappan, K.U. Ramaseshan, S. Govind Swaminathan* for *I. Subramaniam, K. Ramaswami of M/s. K.R. Ramaswami & V. C. Palaniswami* and *V. T. Rangaswami Ayyangar* for *G. Ramaswami* and *P. S. Narasimhan,* for Petitioner.

The Advocate-General and *A. Venugopal,* for Public Prosecutor, for State.

The Court delivered the following

JUDGMENT.—The Coimbatore Central Co-operative Stores was issued a permit in 1957 by the Joint Chief Controller of Imports and Exports, Madras, for the export of 520 tons of chillies to Ceylon. The purchaser in Ceylon was the Co-operative Wholesale Establishment. The Board of Directors of the Coimbatore Central Co-operative Stores allotted this quantity of 520 tons as follows :

Pollachi Co-operative Sales Society	200	tons
Udamalpet Co-operative Sales Society	200	tons
Dharapuram Co-operative Sales Society	50	tons
Coimbatore Co-operative Marketing Society	20	tons
Gobi Co-operative Sales Society	50	tons
	520	tons

As against the 400 tons allotted to the Pollachi Co-operative Sales Society and Udamalpet Co-operative Sales Society, it is found that they exported only 3,581 bags (40 bags are equal to a ton). The Dharapuram Co-operative Sales Society is said to have exported 3,628 bags. The Coimbatore Co-operative Marketing Society 5,200 bags, the Gobi Co-operative Sales Society 3,210 bags, and the Karamadai Sales Society, to which no allotment was made at all, is said to have supplied 5,702 bags. The contract with the Ceylon Co-operative Wholesale Establishment was for supply at the rate of Rs. 115 per cwt. The various affiliated sales societies were to supply to the Coimbatore Central Co-operative Stores at Rs. 98 per cwt. The Coimbatore Central Co-operative Stores was to purchase these chillies only from the various affiliated Co-operative Sales Societies. These societies were themselves to purchase only the chillies produced by their members, who were actually growing the chillies. This is the effect of two circulars issued by the Registrar of Co-operative Societies, Madras, marked as Exhibits P-450 and P-451. Clauses 3, 4, 5, 6 and 7 (wrongly numbered as 5 and 6) and clause 13 at pages 408 and 409 of the printed papers are as follows :

" 3. The entire quantity for export shall be obtained by the District Marketing Society or the Central Stores from the primary marketing societies and not from individuals or from other co-operative organisations.

4. The District Supply and Marketing Society or the Central Stores should obtain an undertaking from the primary Marketing Societies agreeing to supply only the produce actually grown by the members or the members of affiliated societies.

5. In case the quantity so procured falls short of the quota allotted to them, only such quantity should be supplied for export and the balance be surrendered to the District Marketing Societies or Central Stores. On no account the primary societies should resort to purchase from merchants or non-members or even producers living outside the area of operations of the societies.

If any portion of the allotment is surrendered the District Marketing Society or Central Stores may reallot it to some other primary marketing societies that may require additional allotment.

6. For the purpose of verification of the fact that the produce for export has been procured from the members each primary Marketing Society should maintain a register for each commodity, containing full particulars of the names of members, extent of land cultivated, whether the lands are their own or taken on lease, and the estimated yield. When the produce is actually procured from or delivered by a member, an entry should also be made in the register showing the quantity actually received in the society and the date of receipt........

7. In this business the District Supply and Marketing Societies and Central Stores will act only as agents of the primary Marketing Societies and is eligible for a commission of 5 percent. on the netsale proceeds. The entire sale proceeds less all

"incidental charges and the commission will be passed on to the primary marketing societies which supplied the produce and the primary marketing societies will in their turn, pass on the profits in the export trade to the producers after appropriating a commission of 10 per cent. on the net profits..........

13. Any infringement of the conditions indicated above and any misuse of the quota or permits for export by the primary and District Marketing Societies will lead to the cancellation of the allotment of quota or permits issued. Such societies will not be allotted any quota thereafter.

Each Society (both primary marketing and District Marketing Societies) while applying for allotment to quota of export permit should give an undertaking that it will abide by the conditions now stipulated by the Registrar and those that may be imposed from time to time."

The prosecution case was that the market price at about this time was Rs. 80 per bag and that the accused as a result of conspiracy between them made it very difficult for the Pollachi Co-operative Sales Society and Udamalpet Co-operative Sales Society to supply their allotted quotas and this was done by P.W. 1, the approver, who had been appointed as what was called the Selecting Agent or his men by rejecting the produce offered by the Udamalpet Co-operative Sales Society and the Pollachi Co-operative Sales Society. The prosecution case also was that P.W. 1 and his men purchased chillies in the open market at Dindigul and accused 3 and his men purchased chillies at Rajapalayam, that in the beginning they used to send it to the various places in Coimbatore district and had it sent from those places to Tuticorin in order to make it appear that the chillies came from the respective societies in Coimbatore district, that later finding this rather inconvenient, sent their purchases directly to Tuticorin, that the difference between the market price of Rs. 80 per cwt. and Rs. 98 per cwt. which had to be paid to the societies, was to be divided among the various conspirators and that this arrangement was in contravention of the circular of the Registrar of Co-operative Societies and condition No. 7 of the Export Permit issued to the Central Co-operative Stores. P.W. 1 and accused 3 are said to have purchased 6,710 bags and 12,030 bags respectively and these open market purchases by P.W. 1 and accused 3 were sent to Tuticorin and it was made to appear in the account of the respective sales societies and the Co-operative Central Stores as though they had been procured by the respective societies from their grower members and had been exported by them.

On these facts 12 persons were tried by the learned Additional Sessions Judge of Coimbatore. The first accused was the Manager of the Coimbatore Central Co-operative Stores; Accused 2 was the Secretary of the Coimbatore Central Co-operative Stores; Accused 3 was a merchant dealing in onions and chillies at Mathurai; Accused 4 was the Secretary of the Dharapuram Primary Sales Society; Accused 5 was the Secretary of the Coimbatore Primary Marketing Society at Sulur; Accused 6 was the clerk of the Sulur Society; Accused 7 was the President and Accused 8 was the clerk of the Karamadai Primary Sales Society; Accused 9, 10 and 11 were respectively the Vice-President, Secretary and Clerk of the Gobichettipalayam Primary Co-operative Sales Society. Accused 12 was the power-of-attorney agent of K.M. Mohideen & Co., Shipping and Forwarding Agents at Tuticorin. Of the alleged conspirators, P.W. 1 and P.W. 2, who was a clerk of the Central Stores, turned approvers. One Venkatadasari who was the clerk of the Dharapuram Primary Sales Society died before the trial. 61 charges were framed in the case. It is unnecessary to set out at length the various charges against the various accused. Accused 6, 8 and 11 were acquitted by the learned Additional Sessions Judge. The rest were convicted under various charges and they have all preferred appeals to this Court. During the pendency of the appeal, the fourth accused, who is one of the appellants in Criminal Appeal No. 452 of 1963 died. Accused 1 to 5, accused 7, 9, 10 and 12 were found guilty on charge 2 under section 5 of Import and Export (Control) Act of 1947; accused 1 and 2 were found guilty under charge 5 of offences under section 477-A, Indian Penal Code. Accused 4, 5,

7, 9, 10 and 12 were found guilty under charge 6 of offences under sections 467 and 471, Indian Penal Code. Accused 1 and 7 were also found guilty on charges, 12, 14, 16, 18, 20, 22, 24 and 26, under sections 467 and 471, Indian Penal Code. The seventh accused was found guilty on charge 59 of an offence under section 199 read with section 193, Indian Penal Code. Accused 9 was similarly found guilty on charge 61. There are eight appeals before this Court. The State has also filed revision petition for enhancement of sentences on the various accused.

The most important matter that should be mentioned at the outset is the fact that all the accused have been acquitted of the charge of conspiracy. In view of that fact, it would not be necessary to refer to the evidence regarding conspiracy in this case, though in the discussion relating to the other charges, it would be necessary to refer to some of the evidence, which would be relevant in respect of those charges as well as the charge of conspiracy. It is not even necessary to discuss elaborately the evidence with regard to many of the other charges as I will indicate later.

The main charge for consideration would now be charge 2. That charge reads as follows:

> "That you accused 1 to 12 between 20th March, 1957 and 9th April, 1958, at Coimbatore, Dharapuram, Sulur, Karamadai, Gobichettipalayam, Dindigul, Madurai, Rajapalayam and Tuticorin in pursuance of the aforesaid conspiracy contravened clause 3 of the Exports (Control) Order, 1954, by exporting 520 tons of dried chillies from Tuticorin to Ceylon, contrary to restrictions imposed by the Madras State Government and the officers under their control and in violation of the condition 7 of the Export Trade licence, dated 22nd April, 1957, granted by the Joint Chief Controller of Exports and Imports, Madras, in favour of the Central Co-operative Stores, Coimbatore and thereby committed an offence punishable under section 5 of Imports and Exports Control Act, 1947, and within my cognizance."

There is little doubt, as I shall show presently that a large part of the chillies exported to Ceylon was not the produce of the grower members of the various sales societies in Coimbatore district, but were purchased in Dindigul and Rajapalayam by P.W. 1 and accused 3. This part of the case is amply supported by evidence. Though the learned Additional Sessions Judge has discussed this matter elaborately with reference to the oral and documentary evidence in this point, I shall refer to the evidence in brief. In addition to the evidence of P.W. 1 on this point, there is the fact that the Pollachi Co-operative Sales Society and Udamalpet Co-operative Sales Society which had been allotted 200 tons each found it very difficult to supply any chillies because of the action of P.W. 1 or his men in rejecting the chillies sought to be supplied by these societies. The matter went to such length that Mr. Mahalingam, M.L.A. had to write a letter Exhibit P-878, dated 12th June, 1957 to the President of the Coimbatore Central Co-operative Stores. P.W. 105 enclosing a copy of the petition from S. K. P. Kaliappa Gounder P.W. 138 and another T. Venkatakrishna Naicken in which personal allegations had been made against accused 1, that accused 1 and the selection agent P.W. 1 were putting pressure upon the grower members of their society to accept their terms, that is, to pay them at Rs. 3-12-0 per maund if the goods supplied by the members were to be selected and accepted. It is in evidence that in the first instance only about 24 tons were accepted from the Pollachi Co-operative Sales Society and after complaints were received from the said society about 61 tons were exported from this Sales Society. That was because the office bearers of those two societies were not willing to go along with P.W. 1 and accused 1 in the arrangement which they proposed. The Udamalpet Co-operative Sales Socoity got so much frustrated by P.W. 1 and his men rejecting the goods available with them that they refused to have anything to do with the export of chillies. Exhibit P-868 is the letter from the Udamalpet Co-operative Sales Society stating that out of 50 samples of chillies only six were selected by the representative of the forwarding agent as fit for export. In a letter addressed to the Deputy Registrar of Co-operative Societies a copy of which is Exhibit P-867, that society had given as the reason

that the representative who selects the stuff is himself a merchant and so his selection has been unfair.

Then there is the fact that Karamadai Sales Society, though no allotment had been made at all to it, supplied 142 tons. There was not even a letter from that society accepting to supply any chillies, even though a copy of the circular Exhibit P-492 was sent to them. Dharapuram Co-operative Sales Society offered to supply only 5 tons (see Exhibit P-496, dated 29th March, 1957). They presented a bill Exhibit P-783 for the value of 61 and a quarter tons and it ultimately came to supply 92 tons. The Sulur Society was allotted only 20 tons. But the second accused sent a letter Exhibit P-810 allotting an additional quota of 65 tons. Gobi Co-operative Sales Society exported 80 tons as against the 50 tons which were allotted to it. In the report submitted by C.W. 1 Exhibit P-2403 as early as 29th August, 1957, he had pointed out that many irregularities had been committed, that the Coimbatore Central Co-operative Stores had employed P.W. 1 and in conspiracy with the various societies 17,700 bags of chillies belonging to P.W. 1, had been managed to be exported to Ceylon, passing them as collected from the societies. The third accused when examined before Sessions Court practically admitted the truth of the prosecution evidence in respect of the purchases and despatches. The Karamadai Sales Society which as already mentioned had not been officially allotted any quota and which did not offer to supply suddenly supplied 4,720 bags in three days in 23 separate despatches. The evidence on record shows that Karamadai Society could not have really despatched so many bags. P.W. 1 gave evidence about his purchases in Dindigul and their despatch to Tuticorin. There are the bills Exhibit P-207 to 304. His evidence is supported by P.W. 55, who was attached to the tharagu mandy of A. Soudappa Goundar and S. P. Kaliappa Goundar, and by the evidence of P.W. 56 who was attached to A.R.S.M. Somasundaram Pillai, Tharagu Mundy, Dindigul, P.Ws. 62, 64, 65, 70 and 71 speak to the sale transactions covered by bills Exhibits P-247, 248, 256, 262 and 268. P.W. 63, a clerk in the Mundy of Perumal Goundan speaks to the sale of 30 bags under Exhibit P-299 to P.W. 1. P.W. 68 speaks to the transactions covered by the printed bill Exhibits P-291 and 292. The purchases in Rajapalayam by accused 3 are spoken to by P.W. 67 who runs a commission mundy at Rajapalayam, about the sale transaction under Exhibit P-2212 which is the entry found in the name of accused 3 at page 37 of Exhibit P-2213. P.W. 69 who is running a commission mundy at Rajapalayam also gave evidence in regard to this purchase. P.W. 75 a broker at Rajapalayam who was assisting P.W. 118 an employee of accused 3, deposed that P.W. 93 brought P.W. 118 and requested him to introduce him to the mundies dealing in chillies at Rajapalayam and that accordingly, he introduced P.W. 118 to some of the mundies. He also proved the sale transactions as per Exhibit 2245 to 2248 in the mundy of Ramaswamy Raja whose partner was Sankararaja. P.W. 74 another commission mundy merchant of Rajapalayam spoke to the sale covered by the original of Exhibits P-2244 to P.W. 118 for accused 3. In addition, the purchases at Rajapalayam are admitted by accused 3 himself as also his employee P.W. 118 and his son-in-law P.W. 119. In regard to purchases in Dindigul there was also the evidence of P.Ws. 76, 77, 102 and 103, the employees of P.W. 11. There was ample evidence in the form of Exhibits P-131 to 165, 166 and 167, which showed the despatch of these purchases to Tuticorin. There was the fact that Dharapuram Co-operative Sales Society despatched 12 lorry loads on 26th April, 1957 and 27th April, 1957 even before that society had received the circular letter Exhibit P-20. These 12 lorries carried 2,450 bags. According to P.W. 80 out of these 12 lorries, three came from Rajapalayam. Then there was the evidence that as far as Karamadai Sales Society is concerned, that no chillies of the requisite quality is grown there. It is on that basis that no allotment seems to have been made to that society. As already mentioned the circular Exhibit P-498 was not even communicated to the Karamadai Sales Society. P.W. 66, Revenue Inspector gave evidence that registered grower like accused 7 and his brother could not have grown and supplied the chillies indicated against their names in Exhibit P-1313. There was evidence that no chillies

were grown in Survey field 137, 151 and 152 thus showing that the entries relating to accused 7 in Exhibit P-1313 are fictitious entries. We have other documents, which are more or less admissions by one or other of the accused. There is Exhibit P-389 to which accused 3 is a party. The statements made by accused 3 support much of the prosecution case. The letters and notices issued by P.W. 1, also broadly support the evidence of P.W. 1. Then there is the note submitted by accused 2 Exhibit P-883, whether it was submitted on 24th June, 1957 as claimed by accused 2 or in 1958 as mentioned by the President of the Coimbatore Central Co-operative Stores, P.W. 105. The statement found in this note considerably supports the prosecution case with regard to the purchase and despatch of these chillies from Dindigul and Rajapalayam. Thus, the evidence in support of the prosecution case about the purchase and despatch of chillies from Dindigul and Rajapalayam consists of evidence of the purchases at those places and their despatch to Tuticorin, the evidence about the fact that these chillies could not have been grown within the area of the societies, which are supposed to have despatched them, that in some cases, the despatches were made even before societies themselves got the circular letter asking them to supply, that two societies which had been allotted the major part of 520 tons were effectively prevented from exporting large quantities because their office-bearers were not prepared to go along with the accused and the quantity thus saved was purported to have been allotted to the other societies, the office-bearers of which were prepared to go along with the accused and that the society, which has not even been made any allotment and which had not offered to make any export that is, Karamadai Sales Society, is supposed to have exported the largest quantity. I have referred only to some pieces of evidence and not exhaustively on this point. These amply bear out the conclusion of the learned Additional Sessions Judge that the major part of the chillies which were exported to Ceylon, were not the produce of the grower members of the various Sales Societies in Coimbatore district, but were purchased in Dindigul and Rajapalayam by P.W. 1 and accused 3 and exported to Ceylon, as though they were the produce of the grower members of the various Sales Societies in Coimbatore district. I am completely satisfied with the conclusions arrived at by the learned Additional Sessions Judge, on this point. There seems to be little doubt that the various accused, taking advantage of their positions, have used P.W. 1 and accused 3 for purchases of chillies in Dindigul and Rajapalayam and they have made it appear as though they were the produce of the grower members of the various Sales Societies in Coimbatore district. That they should have made considerable sums of money by this process is also obvious. Their profits would probably have been considerably higher and the fraud perpetrated by them might not have been come to light, but for the fact that the Ceylon Co-operative Wholesale Establishment made a cut in the amount to be paid for the chillies exported to Ceylon and this resulted in diminishing the amount available for distribution among the various persons concerned; P.W. 1 being particularly hit hard. But even so, the question remains whether any offence has been committed by the accused which is punishable under law.

Section 5 of the Imports and Exports (Control) Act, 1947, reads as follows :—

> " 5. *Penalty.*—If any person contravenes, or attempts to contravene, or abets a contravention of, any order made or deemed to have been made under this Act or any condition of a licence granted under any such order, he shall, without prejudice to any confiscation or penalty to which he may be liable under the provisions of the Sea Customs Act, 1878 (VIII of 1878) as applied by sub-section (3) be punishable with imprisonment for a term which may extend to one year, or with fine, or with both. Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court, such imprisonment shall not be for less than six months."

The words " or any condition of a licence granted under any such order " were inserted in the section by an amendment, which was not in force when the offences

under consideration in this case are said to have been committed. If the accused were otherwise punishable, the fact that the words above mentioned were not part of section 5, at the time the offences under consideration are said to have been committed, would not make any diffrence and the accused would still be punishable. That is the effect of the decision in *Banarsi Das* v. *Cane Commissioner, U.P.*[1], which approved of the view of the Bombay High Court in the decision in *State* v. *Abdul Aziz*[2], in preference to the view of the Calcutta High Court in *G. T. A. Pillai* v. *H. P. Lohia*[3], Section 3 of the Act is the section, which gave power to the Central Government to prohibit, restrict or otherwise control the import and the export of goods of any specified description into or from India. In pursuance of the powers under conferred by section 3 of the Act, the Export (Control) Order has been promulgated. Clause 5 of the Exports (Control) Order reads thus :

> "5 (1). A licence granted under this Order may contain such conditions not inconsistent with the Act or this Order, as the licensing authority may deem fit.
>
> (2) It shall be deemed to be a condition of every licence—
>
> (*a*) that the licensee shall not, except with the permission in writing of the licensing authority or any person authorised by it in this behalf, transfer the licence;
>
> (*b*) that the goods for the export of which the licence is granted shall be the property of the licensee at the time of the export.
>
> (3) The licensee shall comply with all conditions imposed or deemed to be imposed under this clause."

The licence granted in this case marked as Exhibit P-14, contains among other clauses; the following two clauses;

> "7. This licence does not exempt the exporter from any restrictions imposed by State Government or any of the officers under their control.
>
> 8. (Any special conditions.)."

Clause 3 of the Export (Control) Order, 1962 reads as follows :

> "3. *Restriction on export of certain goods.*—Save as otherwise provided in this Order, no person shall export any goods of the description specified.......... except under and in accordance with a licence granted by the Central Government or by any officer specified in Schedule II."

In this case the export is under a licence granted by an officer specified in Schedule II. So, the further question is, whether the export is in accordance with the licence so granted. The prosecution case is that the conditions in the Circular of the Registrar of Co-operative Societies already referred to and marked as Exhibits P.-450 and P.-451 are restrictions imposed by an officer under the control of the State Government under clause 7, or clause 8 of the conditions of the licence. Clause 8 is really intended to cover special conditions, which may be inserted in the licence itself and as no special condition has been inserted in the licence itself, clause 8 may be left out of account. Nor does the licence contain any conditions of the kind the Registrar sought to impose. So, the question is whether the condition No. 7 enables the Registrar of Co-operative Societies to issue instructions of the kind contained in Exhibits P.-450 and P.-451 and those instructions have the force of law and can be deemed to be conditions imposed by the licence itself, so that it could be said that the accused in this case, by contravening the instructions issued by the Registrar of Co-operative Societies, would be deemed to have contra-

1. (1963) 2 S.C.R. (Supp.) 760: A.I.R. 1963 S.C. 1417.
2. A.I.R. 1962 Bom. 2431.
3. A.I.R. 1957 Cal. 83.

vened clause 3 of the Exports (Control) Order, 1962. Now clause 7 of the licence does not say that the licence will also be subject to such conditions as may be imposed by the State Governments or any of the officers under their control. Neither the Imports and Exports (Control) Act, 1947, nor the Exports (Control) Order, 1962, enables the State Governments or any of the officers under their control to impose any restrictions. Restrictions of the kind which the Registrar of Co-operative Societies has purported to impose cannot be brought in by means of a condition contained in the licence even, if the licence contained a specific provision enabling the State Governments or any of the officers under their control to impose such restrictions. If it is intended to confer on the Registrar of Co-operative Societies, powers to issue the instructions which he had issued, and to make such instructions have the force of law, it would be necessary that the Act itself or at least the Export (Control) Order should confer such power. On the other hand, even if the Imports and Exports (Control) Act or the Export (Control) Order were to confer such power, it should confer the power either on the State Government or any officers specified by the State Government. It should also specify the powers which the State Government or the officers under their control might exercise. If the contention on behalf of the prosecution is to be accepted, it means that the State Government can impose any restrictions they please. The power cannot be conferred on an unspecified class of officers of the State Government, nor could it be conferred in respect of matters not specified so as to make them of the widest amplitude. That would be akin to conferring an unrestricted legislative power, on the State Governments or the officers under their control. Even powers of delegated legislation under statutes should be restricted to specified matters or enable rules to be made only to carry out the purposes of the Act. Under condition 7 of the licence, as contended for by the prosecution, the State Governments or any of the officers under their control can exercise any power and impose any restrictions they choose. The officers of the State Governments so exercising the powers need not necessarily be officers specified by the State Government or authorised by them nor need the powers be confined to the purposes of the Imports and Exports (Control) Act. The purpose of the Imports and Exports (Control) Act, as far as export is concerned, would only be either to permit or prohibit the export of certain specified goods. That those goods should be the product of the Co-operative Societies or the produce of the grower members of the Co-operative Societies is outside the scope of the Import and Export (Control) Act. Therefore, the restrictions of the kind, which the Registrar of Co-operative Societies sought to impose, cannot be imposed even by the licensing authority under the Export (Control) Order; much less can it be done by the Registrar of Co-operative Societies. The intention behind the policy of the Government of India to make the profits arising out of export available only to actual producers may be a good one. It might probably be effected by giving export permit to the producers themselves. But if it is sought to achieve that object, by conferring powers on all and sundry officers or in respect of all conceivable matters, that would be a delegation of naked arbitrary powers, which would not be valid in law. A power of delegation to be valid, should be to the State Government or any of the officers authorised by them either by an order in writing or by a notification in the *Gazette* to exercise powers specifically mentioned in the delegation. This would be necessary to prevent any public servant, who so chooses from arrogating to himself any power he pleases. It would, thus, be obvious that condition 7 of the licence does not enable either the State Government or the Registrar of Co-operative Societies to impose any conditions purported to be imposed under Exhibits P-450 and P-451. The prosecution was not able to show me any other law under which the Registrar of Co-operative Societies, could exercise the powers which he has purported to exercise under Exhibit P-450 or Exhibit P-451.

In fact, the condition 7 of the licence seems to contemplate not the conferment of any power either on the State Government or the officers under their control;

it seems to contemplate a power, which the State Government or the officers under their control might exercise under any other law. For instance, it may be possible for the State Government or the officers under their control in exercise of the relevant powers under the Essential Commodities Act to prohibit the export of chillies from Coimbatore district. Condition 7 of the licence means that if such a restriction is imposed, the fact that the licence has been granted does not mean that the licenced holder can contravene those restrictions. It means that if he does so, he would be liable to be punished under the Essential Commodities Act and that he will not be exempted from the provisions of that Act. It follows that the restrictions imposed by the Registrar of Co-operative Societies had no legal sanction behind it and therefore any contravention of those restrictions would not be an offence punishable under either the Imports and Exports (Control) Act, 1947 or any other law. It may be that as the Registrar himself pointed out in his circular such a contravention might entail cancellation of the licence and the licensee society may also not be allowed any quota thereafter. It may be that the Registrar may have power to take departmental action against the Co-operative Societies or the office bearers thereof under the Co-operative Societies Act or any other Act. Suffice it for the purpose of this case to say that the contravention of the instructions issued in Exhibits P-450 and P-451 would not be a contravention of any law which would make the person so contravening liable to be punished either under Imports and Exports (Control) Act, 1947 or any other law. It follows, therefore, that the conviction of the appellants on charge 2 under the Imports and Exports (Control) Act, 1947 cannot be sustained and their appeal will have to be allowed in respect of that charge.

We shall now deal with charges 5 and 6. Charge 5 is against accused 1 and 2 under section 177-A, Indian Penal Code, for falsification of accounts. Charge 6 is against accused 3 to 12 under section 477-A read with 100, Indian Penal Code, for abetment of falsification of accounts, charge 5 reflects to the falsification of accounts of the Coimbatore Central Co-operative Stores. Charge 7 is against accused 4 for falsification of accounts of Dharapuram Co-operative Sales Society. Charge 8 is against accused 5 for the falsification of accounts of the Coimbatore Marketing Society at Sulur. Charge 9 is against accused 7 and 9 for falsification of accounts of the Karamadai Sales Society and charge 10 is against accused 9, 10 and 11 for falsification of accounts of the Gobi. Co-operative Sales Society. All the accused were acquitted of the charges 7, 8, 9 and 10. So we are left only with the charge 5 which relates to the falsification of accounts of the Coimbatore Central Co-operative Stores and charge 6 against the various office bearers of the four primary societies mentioned above for abetment of the falsification of the accounts of the Coimbatore Central Co-operative Stores. The main evidence is that of P.W. 2, who himself is an approver. He says that he falsified the accounts at the instance and on the insistence of accused 1 after his return from Tuticorin on the 20th May, 1957. He also gives evidence that he told accused 1 that since the goods had been supplied from Dindigul and Rajapalayam also, he could not write in the accounts, as though they were supplied from the different primary societies, that he told the same thing to accused 2 and that accused 2 informed him, that since he had passed the vouchers of the receipts and expenditure. P.W. 2 had simply to enter them in the accounts and there was nothing wrong about that and that he, P.W. 2, wrote falsified accounts in order to safeguard his post in that Coimbatore Central Co-operative Stores, though he was aware that he was writing false accounts. The falsification of accounts consisted of various entries. To take a concrete instance, Exhibit P. 826 contains the entries relating to 9th May, 1957, at page 13 of the day book. Exhibit P-827 is the bill from the Karamadai Sales Society claiming a sum of Rs. 9,137.25 towards the value of 186 bags of chillies and other incidental charges signed by accused 7. A credit entry has been made to the account of Karamadai Sales Society for this sum of Rs. 9,137.25 as claimed in Exhibit P-827. There are number of similar credit entries in respect of supplies made by this society as well as to the various other societies and there are also debit entries as against

these societies for payments made to them towards the bills presented by them and the credit entries made in their favour. It is these entries that are said to be false. I have already held that in respect of some of the chillies sent to Tuticorin, they could not have been the produce of the grower members of the primary societies and that they should have been purchased by P.W. 1 and accused 3 from Dindigul and Rajapalayam and sent to Tuticorin. The learned Additional Sessions Judge has come to the conclusion that these entries are false entries because accused 1 and 2 knew that in the case of most of these bills presented by the primary societies, they do not represent the claim for chillies supplied by the societies themselves; but only for the chillies which had been sent to Tuticorin by P.W. 1 and accused 3 and that this amounts to falsification of accounts. Now, at least as regards the payments made to the various societies, there can be no question of false entries because payments have actually been made. As regards the credit entries in their favour, it is not, as though credit entries were made in their favour while no chillies were supplied at all. Chillies were exported to Ceylon, as though they were exported by the Coimbatore Central Co-operative Stores. Of course, the various primary societies were to have sent the chillies to Tuticorin on behalf of and on account of the Coimbatore Central Co-operative Stores. But by the arrangement between the various office bearers of the societies and accused 1 and 2, as well as P.W. 1 and accused 3 chillies had been sent to Tuticorin to the account of the various primary societies. The bills presented by the various primary societies to the Coimbatore Central Co-operative Stoers and the credit entries in their favour in the account of the Coimbatore Central Co-operative Stores cannot be said to be false in the sense that no chillies were sent to Tuticorin, but claims were made as though chillies had been supplied. It is true, of course, that those societies did not, in a number of cases send chillies from their respective places; nor were they the produce of their grower members. But chillies were as a matter of fact sent to Tuticorin on their behalf by accused 3 and P.W. 1. It has already been held that there was nothing illegal in this. Therefore though the various documents might have been got up to show that the chillies were sent by the primary societies from their respective places and also to show that they were the produce of their members that seems to have been due to the feeling on the part of the accused that they were doing something illegal. In this case even if the Coimbatore Central Co-operative Stores had purchased 520 tons of chillies from the open market and exported, it would not have been contravening any law, nor would it have been contravening any of the conditions of the licence. Similarly, even if the various primary societies had purchased chillies in the open market in order to supply the quotas, which were allotted to them, those societies would not have been guilty of any breach of any law. Therefore, the fact that under the wrong impression that in doing what they did, that is arranging for puchase of chillies in the open market through P.W. 1 and accused 3 and despatching them to Tuticorin, they were guilty of the breach of some law they were trying to create evidence to show that they were despatching the chillies which were produced by the grower members, from their respective places, they were not guilty of any offence. Therefore, when the respective societies presented bills to the Coimbatore Central Co-operative Stores for payment to them for chillies, which in fact had been purchased by P.W. 1 and accused 3 in the open market at Dindigul and Rajapalayam and despatched to Tuticorin on behalf of the various primary societies, the claims of the various primary societies could not be said to be false claims and the entries with regard to them in the accounts of the Coimbatore Central Co-operative Stores could not be said to be false entries. The bills presented by the various societies would be false claims, only if in fact, no chillies had been supplied on their behalf, but payment had been claimed. But in this case, the claim was made only for chillies which were actually supplied though they may not be the chillies which the various primary societies procured from their members and despatched from their respective places. I do not think, therefore, that there is any question of falsification of accounts of the Coimbatore Central Co-operative Stores. It follows, therefore, that accused 1 and 2 are not guilty of the offences with which they are charged under charge 5 and consequently, the

other accused are not guilty of abetting those offences. The whole of the prosecution case rests upon the basis that there has been a contravention of the Imports and Exports (Control) Act, 1947, and the Exports (Control) Order as well as the conditions of the licence. That the various accused have brought into existence various documents, in order to show that the chillies which were exported, were the produce of the members of the primary societies and that they were exported from the respective headquarters of the primary societies is, the whole of the charge in respect of falsification of accounts as well as the preparation of the other documents. Once it is held that there has been no contravention of the provisions of either Imports and Exports (Control) Act, 1947, or the Exports (Control) Order or any of the conditions of the licence, the accused could not be held to be guilty of charges of falsification of accounts.

What I have said immediately above applies also to charges 59 and 61. I am dealing with them even at this stage because the observations which I have made, apply to these charges also. Charge 59 is against accused 7 under section 199 read with 193, Indian Penal Code, and charge 61 is against accused 9 under the same sections of the Indian Penal Code. Sections 199 reads as follows :—

> " 199. Whoever, in any declaration made or subscribed by him, which declaration any Court of Justice, or any public servant or other person, is bound or authorised by law to receive as evidence of any fact, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence."

And section 193 reads as follows :—

> " 193. Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

Section 193 cannot obviously apply because there is no case of fabrication of false evidence for the purpose of being used in any stage of a judicial proceeding. Section 199 cannot also apply here because these are not declarations which any Court of Justice or any public servant or other person is bound or authorised by law to receive as evidence of any fact. Charge 59 is in respect of Exhibit P-87. This is signed by accused 7 in his capacity as President of Karamadai Sales Society. It reads as follows :—

> " We hereby declare that the quantity of 62 tons and 6 cwts. of dried red chillies supplied to Coimbatore Central Co-operative Stores, Limited, by us for export is the produce of our members grown in their fields as detailed below."

The details of supply by eight members includes supply by accused 7 and his two brothers. The evidence in this case, which, in the view that I take of the law it is not necessary elaborately to go into, establishes that the alleged procurement from eight members as detailed in Exhibit P-87, could not be true. But specifically P.W. 66's evidence establishes that survey numbers 137, 151 and 152 could not have been cultivated with chillies in Faslis 1365 and 1366, as shown by the adangals. Therefore, at least in respect of the alleged supply by accused 7 of 960 bags, the entry in the export book Exhibit P-1313 could not be true. Therefore, we can take it as established that accused 7 made the declaration knowing it to be false declaration.

The declaration involved in charge 61 is Exhibit P-1234 signed by accused 9 in respect of supply of 418 mounds of chillies from the self-cultivation in survey field 91-A and 92-B in the village of Veerapandi. P.W. 73 has given evidence with reference to the entries in the adangals that these survey fields had been acquired in 1950 for extension of town and during the period under consideration houses were in existence on those fields. The corresponding entry in the export books

Exhibit P-2047 had been marked as Exhibit P 1312. The only explanation accused 9 could give was that he had given those survey numbers from memory, but that in fact he had supplied chillies grown by him in his own lands. Even so, his declaration that the chillies were raised in survey fields 91-A and 92-B is false.

Now in spite of the fact that these two declarations are false, I do not think that accused 7 and 9 could be held to be guilty of offence under section 199, Indian Penal Code, because the declarations made by them were not declarations which any Court of Justice, or any public servant or other person is bound or authorised by law to revise as evidence of any fact. It is true that P.W. 2 had given evidence that on a particular date, he had been told by the Customs Officer that he had received complaints that the chillies that were exported under the licence Exhibit P-14 were not the produce of the grower members of the various primary societies; but had been brought elsewhere and that he had explained the matter to him and that therefore, subsequently the various declaration forms were got up in respect of the arrivals in Tuticorin on 7th, 8th and 9th May, 1957. But his evidence also is that none of these declaration forms were actually produced before any officer. That apart the Customs Authorities are not concerned with the question, whether the chillies that were exported were chillies grown by the grower members of the various primary societies. They are only concerned with the question, whether there was an export licence permitting the export of chillies. They are not concerned as to who produces those chillies. It cannot be said even that they were interested in finding out that the chillies that were exported were actually the property of the licencee as provided for under clause 5 (*b*) of the Export (Control) Order. That is really a matter for the authorities, who had issued the licence and even for deciding whether the chillies were the property of the Coimbatore Central Co-operative Stores which was the licensee and which was exporting the chillies, it was not necessary to have declaration forms like Exhibit P-87 and P-1234; nor was any public servant or other person bound or authorised by law to receive these declaration forms as evidence of any fact. As I have already held that the instructions issued by the Registrar of Co-operative Societies under Exhibits P-450 and P-451 had no legal sanction, there is no question of any public servant or other person being authorised by law to receive these declarations as evidence of any fact. It follows, therefore, that the charges 59 and 61 cannot be sustained and accused 7 and 9 are entitled to be acquitted under these charges.

The next set of charges are charges 11, 13, 15, 17, 19, 21, 23 and 25 against accused 1, 7 and 12 for forgery of a valuable security under section 467, Indian Penal Code and charges 12, 14, 16, 18, 20, 22, 24, and 26 under sections 467 and 471, Indian Penal Code, against accused 1, 2, 7 and 12 for using forged documents as genuine. In respect of these charges accused 1 and 7 alone have been found guilty and accused 2 as well as accused 12 have been acquitted. All these charges are related in the despatches from the Karamadai Sales Society. Charge 11, is in respect of P-59. Charge 13 is in respect of Exhibit P-83, Charge 15 is in respect of Exhibit P-81. Charge 17 is in respect of Exhibit P-61. Charge 19 is in respect of Exhibit P-63. Charge 21 is in respect of Exhibit P-79. Charge 23 is in respect of Exhibit P-67. Charge 25 is in respect of Exhibit P-45. With regard to the charge 17, it is established that MDY. 966, by which 217 bags of chillies are supposed to have been sent on 7th May, 1957 is a Fiat Car and not a lorry. In respect of the charge 11, which is in respect of Exhibit P-59, it has been found that MDF 1397 by which 250 bags of chillies are alleged to have been sent on 7th May, 1957 is really a Fargo passenger bus. There is in addition the fact that the white katchat Exhibit P-140 in relation to this charge mentions the number as MDU 1394. The substituted voucher Exhibit P-186 shows the number as MDU 1394 and only the voucher which is said to have been forged shows the number as MDF 1397. In view of this confusion charge 11 may be left out of account as also charge 17. Though there is a confusion about the charges 11 and 17 on the ground that they refer to a Fargo passenger bus and a Fiat Car respectively, there is no doubt that the bags of chillies which were alleged to have been sent by these motor vehicles did reach Tuticorin,

It is not now possible to say how exactly this confusion arose. We may, therefore, confine ourselves to the other 6 charges, namely, charges 13, 15, 19, 21, 23 and 25. Charge 13 is in respect of Exhibit P-83. The white katchat in respect of it is Exhibit P-68 and the substituted vouchers is Exhibit P-197. I shall explain what the white katchat and the substituted vouchers are a little later. Charge 15 is in respect of Exhibit P-81 and the white katchat and the substituted vouchers in relation thereto are Exhibits P-135 and P-190 respectively charge 19 is in respect of Exhibit P-63 and the white katchat and the substituted vouchers are Exhibit P-192 and P-136. Charge 21 is in respect of Exhtbit P-79 and the white katchat and substituted voucher are Exhibits P-169 and P-189 respectively. The white katchat and the substituted vouchers in respect of charge 23, are Exhibits P-174 and P-194 respectively. The white katchat and the substituted vouchers in respect of charge 25, are Exhibits P-172 and P-199 respectively. How these documents came into existence are spoken to by P.W. 2, P.W. 4 and P.W. 7. The chillies that arrived in Tuticorin on 7th, 8th and 9th May, 1957, were accompanied by mere white katchat which were brought by the various lorry drivers mentioning the number of bags sent by that lorry and the amount of lorry hire that had to be paid. As already mentioned, P.W. 2 had to give explanation to the Customs Authorities for the rumours which they had heard that the chillies that were exported were not the produce of the grower members of the various primary societies in Coimbatore district, but had been purchased elsewhere. He, therefore, felt the need for some lorry advice letters. Therefore, he made use of the letter paper with the heading of the Coimbatore Central Co-opeative Stores which were with him and brought into existence what are called the substituted vouchers. These are the substituted vouchers which I have already referred to. The white katchats brought by the lorry drivers. I have already referred to as white katchat and they are so referred to in the judgment of the learned Additional Sessions Judge. The charge of forgery is in respect of the acquittance found on the reverse of Exhibits P-59, P-83, P-81, P-61, P-63, P-79, P-67 and P-45 respectively under charges 11, 13, 15, 17, 19, 21, 23 and 25. The charge of foregery in which necessarily the element of payment of money is involved, is sought to be made out by reference to the amounts mentioned in these documents. Whereas the white katchats and substituted vouchers referred to a smaller amount, the documents which were prepared in Coimbatore on the 10th May, 1957 refer to a higher figure. Under charge 11 both the white katchat as well as the substituted vouchers mention a sum of Rs. 100 whereas the documents prepared in Coimbatore on 10th May, 1957 shows a sum of Rs. 156-25. Under charge 13 the figures are Rs. 81-04, Rs. 81-04 and Rs. 140 respectively; under charge 15 Rs. 80, Rs. 80 and Rs. 125 respectively; under charge 19 they are Rs. 80, Rs. 80 and Rs. 136 respectively. Under charge 23 Rs. 81-04, Rs. 81-04 and Rs. 125 respectively; under charge 25 Rs. 81-04, Rs. 81-04 and Rs. 130 respectively. The evidence in regard to the preparation of the documents at Coimbatore is that of P.W. 1, P.W. 7 and of course, P.W. 1 himself. The prosecution case is that the lorry hire that was actually paid to the various lorry drivers are mentioned in the white katchat and the substituted vouchers, but that in the documents prepared at Coimbatore on 10th May, 1957, the higher figure was mentioned that it was intended that K.M. Mohideen Company was to pay the amounts mentioned in the white katchat, but to claim a higher figure from the Coimbatore Co-operative Central Stores and that the difference was to go to accused 1. Exhibit P-775 which has been prepared by P.W. 2 shows the difference between the amount actually paid to the various lorry drivers as lorry hire by the K.M. Mohideen & Co., and what was actually claimed from the Coimbatore Central Co-operative Stores as about Rs. 800. This Exhibit P-775 also contains the lorry numbers to which reference has been made already. Though these letters which were prepared in Coimbatore on 10th May, 1957 contained the signatures of accused 7, and on the reverse acquittances by various persons, who are supposed to have received the amounts mentioned therein, evidence has been let in of witnesses who were connected with those lorries to the effect that the persons who have signed on the reverse of these documents are either persons not known to them, or the signatures are not those of their lorry drivers or cleaners. It is on this basis that the charge of

forgery rests. But apart from the other discrepancies, as to whether these documents could have been prepared in Coimbatore on 10th May, 1957 as for instance as to how the substitued vouchers and the katchats sent by P.W. 2 through P.W. 5 would have found their way into the hands of P.W. 1 and the discrepancy in the evidence of P.W. 4 which the learned Additional Sessions Judge has referred to, there is no direct evidence as to who exactly forged the signatures in the acquittances on the reverse of these documents. Nobody has given evidence as to who signed them. It has not been sent to the handwriting expert to show that accused 7 could have signed them. Indeed the learned Additional Sessions Judge only proceeds on the basis that either accused 1 or accused 7 should have signed them. (See paragraph 165, page 105 of the learned Additional Judge's Judgment). All that he says is that though there is no direct evidence implicating either accused 1 or accused 7 as the persons who made the fictitious stamped acquittance the circumstantial evidence is so clinching and so pointing that the only and irresistible conclusion possible is that it was accused 1 and accused 7, who were responsible for this false document. In the absence of any satisfactory evidence whether accused 1 or 7 was responsible for making the fictitious stamped acquittance, both of them could not certainly be convicted. I fail to understand how the learned Sessions Judge having rightly referred to the decision in re *Risasat Ali*[1], that 'making' means signing found both accused 1 and 7 guilty without deciding who among them signed the acquittance on the reverse of these documents.

This apart, there is no evidence to show that this enhanced sum mentioned in these documents was actually paid by the Coimbatore Central Co-operative Stores. In the bill submitted by the K.M. Mohideen & Co., Exhibit P-1470, there is a reference to the lorry hire paid by K.M. Mohideen & Co., for the various arrivals from Karamadai Co-operative Marketing Society. The debit entries relating to the arrivals of 7th and 8th May, 1957 mentioned the higher figures which are found in the documents which are said to have been prepared in Coimbatore on the 10th May, 1957. This, of course, shows that K.M. Mohideen & Co., have claimed the higher figure whereas they should have paid as shown by the white katchat and the substituted vouchers only the lower figures. But there is no evidence to show that this higher figure was actually paid. Exhibit P-1474 contains a sum of Rs. 3,717-25P. which includes the higher figures found in the documents said to have been prepared in Coimbatore on 10th May, 1957. But including this sum of Rs. 3,771-25 the total comes to Rs. 70,429.65, a sum of Rs. 35,000 has been paid and the balance due is shown as Rs. 35,427.65. There is no evidence that the whole of this sum of Rs. 35,427 65 was actually paid to K.M. Mohideen & Co. If there is such evidence, it could be said that it has been proved that Exhibits P-83, P-81, P-63, P-79, P-67 and P-45 which are said to have been prepared at Coimbatore on 10th May, 1957 were used for the purpose of getting a higher amount than what was actually paid. But there is no clinching evidence on this point. The accused concerned with these charges, that is accused 1 and 7 are therefore, entitled to the benefit of doubt on the question of the making of the documents being the valuable securities. The result is all the appellants are entitled to be acquitted of all the charges on which they have been convicted. It follows therefore, that the revision filed by the State has to be dismissed.

These appeals are therefore allowed, the convictions of the appellants are set aside and they are acquitted. Their bonds will be cancelled.

The evidence in this case is very voluminous. As many as 158 persons were examined by the prosecution. Two witnesses were examined as Court witnesses. 2,515 exhibits were marked on the side of the Prosecution and 231 exhibits on behalf of the accused and two exhibits by the Court. This voluminous evidence has been very carefully analysed by the learned Additional Sessions Judge. His conclusions on the facts have been sound. Where he has gone wrong is only as

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1. (1881) I.L.R. 7 Cal. 353 at 356.

regards the legal consequences that flow from the proved facts. In view of my conclusions on the questions of law that arise in this case, I have not considered it necessary to go in greater detail into the evidence both oral and documentary in this case, except in so far as they are necessary to illustrate the conclusions. But otherwise, I generally agree with the conclusions on the facts arrived at by the learned Additional Sessions Judge. I have refrained from referring to the evidence oral and documetary in greater detail only because, I do not want to load the judgment with unnecessary material. On the proved facts themselves, the accused cannot be said to be guilty of any of the offences with which they are charged.

Before parting with these cases, I would like to mention that much time, labour and money would have been saved, if only someone had applied his mind seriously to the legal consequences that flow from the facts of these cases. As I have held, even on the facts proved, no offence has been committed. If this had been considered even at the beginning, much of the time, expenses and labour could have been saved. I have only to say that nobody need waste any sympathy on the accused.

Revisons dismissed.

V.M.K. *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Original Matrimonial Jurisdiction.)

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

(*In the matter of the Indian Divorce Act*, 1869).

Solomon Devasahayam Selvaraj .. *Petitioner**

v.

Chandirah Mary .. *Respondent.*

Divorce Act (IV of 1869), section 32—Husband and wife setting up a separate house and living there as a result of petition for maintenance by wife—Wife leaving the husband shortly—Subsequent maintenance order against husband by consent—Later enhancement also by consent order—Husband's petition for restitution of conjugal rights—Sustainability—'Desertion'—Test.

From the facts of the case, it is clear that the respondent (wife) was insisting upon a separate establishment being set up, that the petitioner (husband) was not willing to leave his brother and sister-in-law and that the petitioner also apparently had his grievance about the respondent going away to her parents' house off and on and taking her own time for coming back. These things naturally led to the feelings becoming embittered, which ultimately resulted in the wife filing a petition for maintenance. As a result of what happened in the Court, the husband set up a separate home to which both the parties moved in November, 1959. After about three weeks, the wife was taken away by her father to his house and thereafter, the parties had not been cohabiting together. Subsequently in 1960 on the petition of the wife an order for maintenance (by consent) was made against the husband and in 1965 it was enhanced by a consent order. The husband then applied for restitution of conjugal rights.

Held : From the evidence adduced in this case, it is clear that the respondent (wife) had been insisting upon a separate establishment and having got one, would not have left it without sufficient reason; the petitioner (husband) had compelled the wife to leave the matrimonial home; she could not be deemed to have deserted.

The sole object of the petitioner, filed after a long lapse of time, is to get rid of the maintenance order passed against the petitioner.

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*O.M.S. No. 14 of 1965. 21st September, 1967.

Obiter: It is high time that the Indian Divorce Act is brought into line with the Hindu Marriage Act, the Parsi Marriage Act and the Special Marriage Act, 1954.

It is unnecessary and wholly incongruous that the cases under the Indian Divorce Act should be heard by a High Court Judge in the city and decrees passed by District Judges should be confirmed by a Bench of three Judges of the High Court It is necessary and it would be advisable to bring the provisions of the Indian Divorce Act in regard to divorce and judicial separation, in line with the provisions of the other three Acts.

O. K. Nambiyar, for Petitioner.

J. Samuel, for Respondent.

The Court made the following

ORDER :—This is a petition under section 32 of the Indian Divorce Act by a husband for restitution of conjugal rights against his wife. The parties are Indian Christians. They were married on 26th May, 1955. The husband was then living with his brother and his family and the wife was taken to that house. Soon after about the middle of July, 1955, the wife was taken to her parents' house for the month of 'Adi' as is usual in the south in the case of newly married brides. She came back to the husband's house not at the end of Adi but much later. It appears that the wife used to go to her parents' house off and on and once the husband's brother's father-in-law had to go and persuade the wife's parents to send her to her husband's house and another time one Rev. Chinniah had to be approached. Ultimately in 1959, the wife filed a petition before the Chief Presidency Magistrate under section 488, Criminal Procedure Code, for maintenance. As a result of what happened in the Court, the husband set up a separate home to which both the parties moved on 19th November, 1959. After about three weeks, the wife was taken away by her father to his house and thereafter, the parties had not been cohabiting together. Immediately after the wife went to her parents' house, she filed another petition for maintenance and without much contest, she was awarded a sum of Rs. 25 per mensem as maintenance on 18th January, 1960. In 1965, she filed another petition for enhancement of maintenance and it was enhanced to Rs. 35 per month with the consent of both the parties. Thereafter, the husband sent a notice demanding that his wife come and live with him and followed it up with the present petition.

The wife's contention is that she was treated with cruelty by her husband and his sister-in-law and that therefore, she was forced to leave. She also alleged that her husband had illicit intimacy with his sister-in-law and that because she found it out her husband and his sister-in-law began to ill-treat her. She further alleged that after they set up a separate establishment soon after the first petition for maintenance, the husband never lived in the house and was always taunting her saying that as she wanted a separate house and he had provided it, she should be satisfied with it and that she could not expect any other husbandly actions or attitudes from him, and that was why, she had to leave on the 14th December, 1959. On the other hand, the petitioner's case was that the respondent had already, even before her marriage, given her heart to another young man and that she was, therefore, unwilling to have normal sexual relations with the petitioner, and that the respondent's father was trying to get a divorce for her and also a lump sum from the petitioner so as to enable the respondent to be married to another young man.

I am satisfied that the allegation of the respondent that she found her husband and his sister-in-law in compromising circumstances is wholly untrue. This could not have happened in the case of a newly married husband within 10 days of the marriage, nor is it likely that the husband was sleeping separately and that this enabled him to have illicit intimacy with his sister-in-law. The particulars, as to

the happenings on the night on which the respondent says she found her husband and his sister-in-law in bed together, are too artificial to be believed. The husband could not have come into the room in which the respondent was lying down and immediately gone out to lie with his sister-in-law. He should certainly have expected that his wife would be awakened and might even notice what he was doing. Nor am I able to accept the respondent's evidence that she and her husband had sexual relations only on the first two days and not thereafter. The story of the respondent about her husband having taken away her chain, necklace, ear-rings and ring also sounds too artificial. They could not have needed repairs so soon after the marriage, having only recently been made; nor can I accept her evidence that her husband gave the necklace, which was presented to her by her father, to her husband's sister-in-law and that she was wearing it. Indeed, the respondent had to change her version and say that it was converted into a chain and given to his sister-in-law.. The petitioner and his sister-in-law could certainly not have shown their relationship so openly; nor can I believe the respondent when she says that when she found fault with her husband the next morning, he and sister-in-law beat her and fisted her and her husband's brother kept quiet even though he came to learn of his wife's illicit relationship with his brother. The whole story is thoroughly artificial and the incident is unlikely.

What has happened about the necklace given to the respondent by her father is that because of his needs and because he had to incur some debts in connection with the respondent's marriage, her father seems to have pledged it. This is clear from the letter Exhibit P-6 written by the respondent herself to her father. I cannot accept her evidence that that letter was not written by her and that she cannot read well. This is only a pretence; nor can I accept her father's evidence that he is not able to say whether it is a letter written by his daughter. I accept the petitioner's evidence with reference to this letter. Respondent's father also accepts that he pledged it. In fact, it is this fact of having pledged the necklace and also probably respondent's father's inability to provide the things necessary to set up a household, that seems to have been responsible for the delay in the respondent being sent back to her husband's house.

Equally, I must say, I am not convinced of the petitioner's case that from the beginning the respondent was showing an unwillingness and disinclination to have sexual relations with him and that she said that she had already given her heart to another young man and that she had been forced to marry him and that, therefore, she was not willing to have sexual intercourse and that she was giving various excuses like pain in the chest etc. Indeed, it is obvious from the evidence of petitioner that he had sexual relations quite frequently with the respondent. I am not able to accept his evidence that he had sexual relations with respondent either while she was sleeping or by forcing her. His story about the respondent having told him about her having given her heart to another young man, cannot be true. The betrothal took place three months before the marriage and if the respondent was unwilling to marry the petitioner and had already given her heart to another young man, she could have refused to marry him. I accept the evidence of the respondent and her father on this point that the respondent never expressed her unwillingness to marry the petitioner. This is only an excuse thought of by the petitioner to buttress his case. It is unfortunate that both sides have freely lied about the facts of this case, and it is therefore rather difficult to arrive at the truth. Even the respondent had said that she had sexual relations with the petitioner only for two days and that thereafter, the petitioner refused to have sexual relations with her.

We probably get a picture fairly near the truth from the evidence of the petitioner's sister-in-law. She said that the petitioner and the respondent had to go to the open terrace in order to speak to one another and that she thought a separate establishment should be set up for them. I cannot accept the evidence of Srinivasa Mudaliar in regard to what the petitioner is said to have told him about the sexual relations between the husband and the wife. He and the petitioner's brother are very old friends, having started their life together in school and later as labourers

in the Buckingham and Carnatic Mills, though he is now in prosperous circumstances. It is obvious that all his sympathies are with the petitioner and his brother. The truth seems to be that the petitioner having been brought up by his brother and sister-in-law from his childhood and got married by them, was very much attached to them and did not want to leave them and set up a separate establishment. That he should have been very much attached to his brother and his sister-in-law is obvious, and that he should have shown respect to his sister-in-law is also obvious. This would also prove that the story of the respondent about the illicit intimacy between her husband and his sister-in-law cannot be true. What seems to have really happened is that the respondent wanted a separate establishment to be set up. In addition, she also does not seem to have been of very robust health and on that account and on account of her mother's illness, she used to go to her parents' house now and then. This is clear from the evidence of the petitioner's sister-in-law herself. She only says that whenever the respondent went to her parents' house that was for a justifiable reason and they only found that the respondent found it difficult to come back. She also says that both the husband and wife were happy, and even the petitioner had to admit that except in the matter of sexual relationship, to all outward appearances during day time, the respondent was behaving normally. So, the inference, which we can draw from the circumstances, is that the respondent was insisting upon a separate establishment being set up, that the petitioner was not willing to leave his brother and sister-in-law and that the petitioner also apparently had his grievance about the respondent going away to her parents' house off and on and taking her own time for coming back. These things naturally led to the feelings becoming embittered, which ultimately resulted in the wife filing a petition for maintenance.

As happens in most cases, when the wife files a petition for maintenance, the husband comes forward with an offer to set up a separate establishment. It was also aided in this case by the advice of the Magistrate that young people should live together and a separate establishment should be set up. In fact much of the trouble in this case could have been avoided, if only the husband had set up a separate establishment soon after the marriage, especially when the respondent was wanting a separate establishment and even the sister-in-law says that she thought that is was better to have a separate establishment. After all, when a man marries, he is bound to provide a matrimonial home for the wife and he cannot go on living with his brother and his sister-in-law. The very suggestion put to the respondent on behalf of the petitioner that his brother had put up a big house seems to imply that the respondent and the petitioner should live with the petitioner's brother and that the respondent was being unreasonable in insisting upon a separate establishment.

According to the respondent after a separate establishment was set up, the petitioner did not stay in that house at all. He did not even provide her with the things necessary for cooking. He used to go in the evenings, stay in the verandah and go away and when asked, he said that the respondent had insisted upon having a separate establishment, that he had given it to her and that she should be satisfied with it. He also said that because the Court asked her to go and live with him, she should not have agreed and she should suffer for that and he would not be a husband to her. I cannot accept the evidence of the petitioner that he was a dutiful husband during this period, that he had provided all the necessities for the living, that he used to sleep there and that he does not know why his wife went away. I accept the evidence of the respondent's father on this point as also that of the respondent. A woman, who has been insisting upon a separate establishment and has got one, would not leave it without sufficient reason. In fact, we get an indication of the truth of this from the evidence of Srinivasa Mudaliar himself though Srinivasa Mudaliar wanted to make it appear that the respondent's father merely anxious to get a lump sum from the petitioner, so as to enable him to get his daughter married again. He had to say that the respondent's father came and told him that his daughter was not properly treated, but like a dog, and that he should arrange for payment of a lump sum. He also had to admit that the respon-

dent's father had told him that he was not anxious in getting maintenance because his daughter would always be weeping and therefore, he should arrange as he had asked for. Thus, even from the mouth of a witness favourable to the petitioner, it is established that it was not the respondent that was anxious to live separately from the husband, that it was not she who wanted maintenance and that she was feeling unhappy over having to live away from her husband. It was because the respondent and her father realised that the petitioner did not want her and that he was more particular about living with his brother and sister-in-law rather than living in a separate house with his wife, they thought that it would be better to put an end to the misery of both parties by getting a divorce and getting the respondent married off to another person. There is nothing unreasonable about this.

It is unfortunate that the law being what it is, nothing could be done about such a situation. The facts of this case clearly show that the respondent had to leave the matrimonial home not because she did not want to live with the petitioner, but she realised that it was not possible to live with the petitioner and because the petitioner had compelled her to do so. In law that is sufficient reason to resist the petition for restitution of conjugal rights.

In Rayden on Divorce, Ninth Edition, at page 175, the following passage occurs:

> "Desertion is not to be tested by merely ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of the other to leave home it may be that spouse responsible for the driving out is guilty of desertion. There is no substantial difference between the case of a man who intends to cease cohabitation and leaves his wife; and the case of a man who compels his wife by his conduct, with the same intention to leave him; and the case of one who persists in treating his wife in a way which he knows she will probably not tolerate and which no ordinary woman would tolerate and she leaves him."

See also the decision in *Bipinchandra Jaisingbai Shah* v. *Prabhavati*.[1]

At page 179 of the same work it is mentioned as follows:

> "Where conduct of the required nature is established, the necessary intention is readily inferred for *prima facie* a person is presumed to intend the natural and probable consequences of his acts and it is not necessary to show in a case of constructive desertion some definite evidence of a clear intention on the part of one spouse to drive the other away".

At page 195 it is mentioned as follows :

> "The Court has power to refuse a decree for restitution of conjugal right wherever the result of such decree would be to compel the Court to treat one of the spouses as deserting the other without reasonable cause contrary to the real truth of the case."

At page 200 it is mentioned as follows :

> "It is a husband's duty to provide his wife with a home according to his circumstances. There is no absolute rule whereby either party is entitled to dictate to the other where the matrimonial home shall be; the matter is to be settled by agreement between the parties, by a process of 'give and take' and by reasonable accommodation."

That, the husband has not done in this case.

I must make it clear that the sole object of the petitioner in instituting these proceedings is to get rid of the maintenance order against him. Otherwise, he need not have waited from 1960 to 1965 having practically consented to an order for maintenance both in 1960 as well as in 1965. It is obvious that his action in instituting these proceedings is because the maintenance rate had been increased by the 1965 order and he wants to get rid of it. In view of the fact that his case is that the respondent was unwilling to offer him sexual satisfaction, one cannot

1. (1957) S.C.J. 144 : 1956 S.C.R. 838 : A.I.R. 1957 S.C. 176.

believe that he is still hoping that when she comes back, she would do so. The wife's attitude in refusing to go back to her husband is clear when she says that if the offer had come much earlier she would have accepted and that it is now too late. He had never made an offer after 1959 to get back his wife. The wife's evidence on this point has a ring of truth about it. At page 266 of Rayden's the following passage occurs:

> "The motives for seeking relief must be *bona fide* and direct; the sense of injury must not be wanting and a decree may be refused, after a long delay during which the remedy was known, when the true motive of the petitioner (this particularly applies to a wife) appears to be a collateral nature."

Though at page 269 it is mentioned that the delay occasioned, for instance, by poverty, does not affect a suit for restitution of conjugal rights, it is also mentioned that unexplained delay in bringing the suit might influence the mind of the Court in a subsequent suit for dissolution and that the Court must be satisfied of the petitioner's sincerity. I am satisfied that in this case, the sincerity is lacking in the petitioner's action and his sole object is to get rid of the maintenance order against him. To make an order in his favour would be contrary to the facts of this case and the petitioner being allowed to take advantage of his own wrong.

The petition must therefore stand dismissed. The result is unfortunate. The respondent continues to get maintenance, which is very poor satisfaction for a young woman in her thirties. The husband has no wife and that again is unfortunate for a young man in his thirties. But the law being what it is, there is nothing which this Court can do to help the parties.

The petition is dismissed, but in the circumstances both parties will bear their own costs.

Before parting with this case, I want to make a few general observations. The Indian Divorce Act, 1869 is wholly out of date. Its provisions were exact copies of the English Matrimonial Causes Act of 1857. Under that Act, it was enough if the husband proved adultery in order to enable him to get a divorce from his wife. On the other hand that was not enough for a wife to get a divorce against her husband. Something more must be proved. The law had been amended in England as early as 1923 by the Matrimonial Causes Act, 1923, putting the husband and the wife on equal footing. The Matrimonial Causes Act of 1937 added some more grounds for divorce. The law in India under the Hindu Marriage Act is practically the same as in England at present. The Parsi Marriage Act was amended in 1936 to put it more or less on the same basis as the English law of 1937. Only the Divorce Act which applies to Christians is at least 50 years behind the times. No one will consider that the Christians are a backward community compared to the other communities in the country. It is high time that the Indian Divorce Act is brought into line with the Hindu Marriage Act, the Parsi Marriage Act and the Special Marriage Act, 1954. Indeed, the Special Marriage Act even provides for divorce by consent of parties.

Another important matter is that under the Indian Divorce Act for cases arising inside the city of Madras, the High Court is the Court competent to try such cases whereas in the case of other communities, the City Civil Court, Madras, can deal with the cases. What is more a decree for dissolution of marriage of nullity of marriage passed by a District Judge has to be confirmed by a Bench of three Judges of the High Court. In the case of the other communities the Subordinate Courts are competent to deal with these matters and the ordinary provisions of appeal in civil cases apply. It is unnecessary and wholly incongruous that the causes under the Indian Divorce Act, should be heard by a High Court Judge, in the city and decrees passed by District Judges should be confirmed by a Bench of three Judges of the High Court. It is necessary and it would be advisable, to bring the provisions of the Indian Divorce Act, in regard to divorce and judicial separation, in line with the

provisions of the other three Acts already mentioned. While that is a matter for the Legislature to consider in its own good time the question relating to the forum of trial as well as of appeal under the Indian Divorce Act is an urgent matter. There is no need to waste the time of the Judges of the High Court over matters which relate to the Christian community which are no more important than similar matters relating to the other communities.

V.M.K. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE T. RAMAPRASADA RAO.

Bata Shoe Company Private Limited .. *Petitioner**

v.

The Joint Commercial Tax Officer, Harbour Division II, Madras and another .. *Respondents.*

Madras General Sales Tax Act (I of 1959), section 12 (2)—Assessee filing return belatedly but before order of assessment—Assessment by best judgment without considering the return filed—Validity of —Assessing Officer in making the assessment bound to consider the return filed belatedly.

There is no provision in the Madras General Sales Tax Act, 1959, which fobids filing of a return after a prescribed time or which forbids a return filed belatedly being considered by the assessing officer in the assessment proceedings. The scheme of section 12 (2) is not that once a return has not been filed within the prescribed time, but filed thereafter, it is to be treated as a waste paper not deserving any consideration at the hands of the assessing officer. The whole object of sub-section (2) is to provide for two contingencies (1) where a return has not been filed within the prescribed time, and (2) where one is filed and it is in the opinion of the assessing officer incorrect or incomplete. In either of these cases the jurisdiction of the officer to assess by best judgment does certainly arise. But this does not mean that where before an assessment order is made a return is filed, though belatedly, the assessing officer is at liberty to ignore it and still apply his best judgment. Such a procedure will be wholly unrealistic and unrelated to the task of finding out the true net chargeable turnover which is the object of section 12. Though the jurisdiction to assess by best judgment may arise in the event of an assessee failing to file his return within the prescribed time, nevertheless, the return filed belatedly is bound to be considered by the assessing officer in making the assessment. It necessarily follows from this proposition that he has to look into the return and if he feels that it is incomplete or incorrect, he has to follow the procedure prescribed by the proviso to sub-section (2) and give an opportunity to the assessee to prove the completeness or correctness of the return. Where a true and complete return is filed, though out of time, the Act does not compel the assessing officer to ignore it, indulge in imagination and arrive at something which is not related to the facts as shown by the return. The very concept of best judgment presupposes the absence of a return, or a return which is incorrect or incomplete.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in M.G.S.T. No. 1086/65-66 dated 4th January, 1967 on the file of the first respondent herein and quash the said order made therein.

V. K. Thiruvenkatachari for King and Partridge, for Petitioner.

The Special Government Pleader, for Respondents.

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* W.P. No. 589 of 1967. 18th October, 1967.

The Order of the Court was made by

Veeraswami, J.—The petitioner is a private limited company and seeks to have an order of the Joint Commercial Tax Officer, Harbour Division II, quashed. The assessment to sales tax relates to the assessment year 1965-66. The return for the year was due to be filed on or before 1st May, 1965, but it was actually filed only on 31st December, 1966. In the meantime, the Joint Commercial Tax Officer started proceedings proposing by his notice dated 28th December, 1966 to determine the taxable turnover by best judgment at a certain figure and to levy tax at different rates on different items of turnover specified in the notice. It appears that by then the assessing officer had called upon the petitioner to produce accounts and for that purpose granted at its request several adjournments, but finally, he declined to give time beyond 15th December, 1966. The explanation for filing the return belatedly was that the petitioner had to receive figures from various places of business and compile the same to fill in the return. The Joint Commercial Tax Officer made an assessment by an order dated 4th January, 1967 by applying his best judgment. He thought that the return filed before then need not be taken into account and that he was entitled to proceed on the basis that there was no return and applied his best judgment to determine the taxable turnover. He has also levied penalty under section 12 (3) in a sum of Rs. 3,22,391, that being, according to him, one and a half times the tax assessed.

The contention for the petitioner is that the order of assessment by best jugdment is vitiated on account of the fact that it ignored the return filed before the assessment order was made. We think the ground is well-founded. There is no provision in the Madras General Sales Tax Act, 1959, which forbids filing of a return after a prescribed time or which forbids a return filed belatedly being considered by the assessing officer in the assessment proceedings. We do not understand the scheme of sub-section (2) of section 12 to be that once a return has not been filed within the prescribed time, but filed thereafter, it is to be treated as a waste paper not deserving any consideration at the hands of the assessing officer. We take it that the whole object of sub-section (2) is to provide for two contingencies (1) where a return has not been filed within the prescribed time and (2) where one is filed and it is in the opinion of the assessing officer incorrect or incomplete. In either of these cases the jurisdiction of the officer to assess by best judgment does certainly arise. But this does not mean that where before an assessment order is made a return is filed, though belatedly, the assessing officer is at liberty to ignore it and still apply his best judgment. Such a procedure will be wholly unrealistic and unrelated to the task of finding out the true net chargeable turnover which is the object of section 12. Though the jurisdiction to assess by best judgment may arise in the event of an assessee failing to file his return within the prescribed time, nevertheless, the return filed belatedly is bound to be considered by the assessing officer in making the assessment. It necessarily follows from this proposition that he has to look into the return and if he feels that it is incomplete or incorrect, he has to follow the procedure prescribed by the proviso to sub-section (2) and give an opportunity to the assessee to prove the completeness or correctness of the return. Where a true and complete return is filed, though out of time, we do not think that the Act compels the assessing officer to ignore it, indulge in imagination and arrive at something which is not related to facts as shown by the return. We are, therefore, of opinion that the order of the assessing officer is vitiated by reason of the fact that he thought that the return filed belatedly was not at all to be taken into consideration and that he was in duty bound to proceed and assess the petitioner by best judgment.

Our attention has been invited to an order of this Court *M/s. Deekan Trading Co.* v. *The Joint Commercial Tax Officer and another*[1] in which a contrary view has been taken to the effect that a return filed belatedly is not bound to be considered. With respect, for the reasons already mentioned by us we are unable to share this view. As a matter of fact, a Division Bench of this Court

1. W.P. No. 674 of 1962.

in the *State of Madras* v. *M. S. K. Shahul Hameed*[1], has held that, though an assesse submitted erroneous provisional monthly returns, nevertheless, they could not be made the basis of an assessment under sectinon 12 (2) if before an assessment order is made, the assessee informs the assessing officer of the correct return of the turnover. We observed that in such a case the officer was bound to make the assessment only on the basis of such correct return and not on the basis of the provisional returns. No doubt this is not a case of provisional returns, but all the same, the principle of this judgment applies. The very concept of best judgment presupposes the absence of a return, or a return which is incorrect or incomplete. The return submitted cannot, as we mentioned, be ignored if it is filed before the assessment order is made, only on the ground that it has been belatedly filed.

On that view of the matter, the propriety of the levy of penalty does not arise for it should fall with the main order of assessment. The order of assessment is quashed and the petition is allowed. The assessing officer will, however, be at liberty to proceed with the assessment having due regard to the return filed. No costs.

S.V.J. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE T. VENKATADRI.

M. Anandan, Proprietor, Vega Motors, Aruppukottai .. *Petitioner**

v.

M.M. Palaniswami Nadar & Sons (Firm), Chandra Transports, Aruppukottai and another .. *Respondents.*

Motor Vehicles Act (IV of 1939)—*Application by* A *for extension of his route—Extension sought for falling on route covered by an existing operator* B—*Later on* B *applying for grant of additional trips in his route—Both applications if should be consolidated and heard together—Doctrine of " mutually exclusive "—Applicability.*

Where a transport operator applies to the Regional Transport Authority for extension of his route, the extension sought for falling on the route already covered by an existing operator, and later on the latter operator applies to the Regional Transport Authority for the grant of additional trips in his route, the two applications need not be consolidated and heard together. The application for grant additional trips is neither inter-connected nor intertwined nor interlaced with the application for extension of the route. To such a case the doctrine of " mutually exclusive " which lays down that where there is a common question of fact or law all the applications should be consolidated and jointly heard and disposed of, would not apply. It cannot therefore be insisted that the Regional Transport Authority should take up both the applications together for consideration and disposal.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *mandamus* directing the Regional Transport Authority, Ramanathapuram, not to consider or grant any additional trips to the first respondent on the sectors Virudhunagar to Kamudi *via* Mandapasalai and in any event defer the consideration of applications in the above till the pettitioner's application for extending his route Mandapasalai to Virudhunagar *via* Aruppukottai as Kamudhi to Virudhunagar *via* Neeravi Mandapasalai and Aruppukottai in respect of his bus MDR. 4040 since replaced by MDR. 4998 is also taken up for consideration.

1. (1967) 2 M.L.J. 78 : (1967) 19 S.T.C. 288.

*W.P. No. 1946 of 1967. 30th October, 1967.

V. C. Palaniswami, for Petitioner.

V. K. T. Chari for *C. S. Prakasa Rao*, for 1st Respondent.

The Government Pleader, for 2nd Respondent.

The Court made the following

ORDER.—The short and simple question that arises for consideration in this writ petition is whether the Regional Transport Authority, Ramanathapuram, should consider the application filed by the petitioner for extension of route and the application for additional trips filed by the first respondent together or preference should be given to the petitioner's application for extension of route in the matter of hearing and final disposal.

The petitioner is a fleet-owner and is running one of his buses from Vrudhunagar to Mandapasalai, a distance of 23 miles. The first respondent is another fleet-owner who is running one of his buses on the route Virudhunagar to Mudukalathur, a distance of 50 miles; and another bus from Aruppukottai to Mudukalathur, a distance of 47 miles. On these routes, there are two important places, Neeravi and Kamudhi, where there is a long felt need for transport facilities to the villagers of the two places. In order to satisfy the need of these villagers, the Regional Transport Authority, by his memo. No. 12070-B2/65 dated 29th April, 1965, requested the operators who were running their buses on the route to apply for variation of the route before 10th May, 1965. It is in pursuance of this memo, the petitioner applied for extension of his route namely from Virudhunagar to Kamudhi touching Neeravi.

Immediately, the first respondent filed a writ petition (W.P. No. 2954 of 1965) to restrain the Regional Transport Authority from considering the application of the petitioner for extension of route, on the ground that a portion of the sector sought to be extended overlapped the routes operated by the buses of the Madras State Transport Department. Though that writ petition was dismissed by this Court, the first respondent has carried the matter to the Supreme Court. In the meantime, the Regional Transport Authority, by his letter dated 16th September, 1965 (C. No. 33575/B2/65), requested the first respondent to apply for additional trips or for variation in respect of particular buses of his. The purpose mentioned was that the grant of additional trips or variation would not only be advantageous to the permit-holder but would also provide additional transport facilities to the public who complained about lack of adequate facilities in those areas. Therefore, in pursuance of that memo. the first respondent applied for additional singles for buses MDR 3146 (since replaced by MDR 4106) and MDR. 3836 (since replaced by MDR. 3146). The grant of additional trips was considered, because it was noticed by the Regional Transport Authority that the first respondent was then running a low mileage of 140 and 170 miles per day in respect of these two buses; and further first respondent was finding it difficult to run them efficiently, in view of the rising cost of operation and high taxation. The petitioner, in his turn, is now adopting obstructive tactics for consideration of that application of the first respondent by the Regional Transport Authority. The petitioner has complained that, if the application of the first respondent for grant of additional trips is allowed, not only his business would be affected but also the consideration of his application would be prejudiced. Thus, these two rival fleet-owners are vying with each other and are resorting not only to obstructive tactics to restrain the Regional Transport Authority from considering each other's application but are also thwarting the attempt of the Regional Transport Authority to give adequate transport facilities to the public of the locality wherein the route lies. The Regional Transport Authority fixed 15th July, 1967 for consideration of the first respondent's application for grant of additional trips. It is at this stage the petitioner has rushed to this Court and filed the present writ petition, for the issue of a writ of *mandamus*, directing the Regional Transport Authority, Ramanathapuram, not to consider or grant additional trips to the first respondent and in any event defer the consideration of that application till the petitioner's application for extension of route is also taken up for consideration.

The question for consideration, therefore, is, as I said, whether the petitioner can insist on the Regional Transport Authority taking up both the applications for joint consideration and disposal.

There are now two applications for consideration before the Regional Transport Authority, Ramanathapuram. The petitioner's application is for extension of route. The first respondent's application is for additional trips on the existing route. The contention of learned Counsel for the petitioner is that these two applications should be considered together or at least his application for extension of route should be taken up first for consideration. He, however, contends that it is just and necessary to decide these two applications together, because if one application is taken up for disposal without taking into consideration the other application, there would not be any hearing of his right and there will be denial of hearing of his case. He wants me to apply the doctrine of ' mutually exclusive ' as stated by Parker in his book on administrative Law at page 329 :

> " ......actions involving common questions of fact or law may be consolidated in the discretion of the Court........ At times a consolidation will be essential in the interest of justice........"

He states that the grant of permit on one application would be denial of natural justice and the other application would become an empty thing.

No doubt the theory advanced by learned Counsel for the petitioner seems to be an attractive one. But on hearing the arguments of learned Counsel for the first respondent, Sri V.K.T. Chari, I am afraid that the doctrine of ' mutually exclusive ' could not be applied to the proceedings before me. It is common case that the petitioner's application is for extension of route and the first respondent's application is for grant of additional trips. There is, therefore, nothing in common between them. The petitioner is a permit-holder for the route Virudhunagar to Mandapasalai. He filed an application for extension of route upto Kamudhi. It has now been held that, if the Regional Transport Authority decides to grant extension of route, it should be deemed in law to be a new route. Other operators can also apply for this route, when the Regional Transport Authority decides to extend the route from Virudhunagar to Kamudhi. Thus, if and when the Regional Transport Authority decides to take up for consideration the application of the petitioner for extension of route, he should also take into consideration the applications of other operators who seek permits for this new route. Dealing with this doctrine, a Division Bench of this Court has observed in W.A. Nos. 265 and 266 of 1965:

> " ......this Court took the view that both the application for an extension *simpliciter* by a pre-existing operator on a particular route, and an application by another party for the entire extended route, should, in fairness and propriety, be considered together by the Regional Transport Authority, so that all relevant objections and claims and counter-claims could be heard and determined together."

This principle has also been laid down in the case of *Ashbacker Radio Corporation* v. *Federal Communications Commission*[1], where the Supreme Court of the United States observed:

> " We do not think it is enough to say that the power of the Commission to issue a license on a finding of public interest, convenience or necessity supports its grant of one of two mutually exclusive applications without a hearing of the other. For if the grant of one effectively precludes the other, the statutory right of a hearing which Congress has accorded applicants before denial of their applications become an empty thing."

This theory was also adopted by another Court in the United States in *North West Airlines* v. *Cab*[2]. The principle therefore seems to be that, where there is a common

1. 90 Lawyers Edition, 108 at 111.
2. 90 U. S. App. D. C. 158.

question of fact and law, all the applications should be consolidated and jointly heard and disposed of.

But we have to consider whether that theory would be applicable to the facts of this case. I am of opinion that when considering an application for extension of route and an application for grant of additional trips on a route granted to the operator, this theory would not apply. In this case, the Regional Transport Authority invited the first respondent to apply for additional trips to provide for adequate transport facilities to the public, who were complaining about lack of the same. From the operator's point of view, the grant of additional trips on the existing route would enable him to run the bus efficiently in view of the rising costs of operation and high taxation. Such an application for grant of additional trips is neither inter-connected nor intertwined nor interlaced with an application for extension of route. The petitioner cannot, therefore, insist on the Regional Transport Authority taking up both the applications together for consideration and disposal. Nor can he insist on the Authority taking up his application first for disposal. The Regional Transport Authority is directed to dispose of the application of the first respondent for grant of additional trips and the application of the petitioner for extension of route separately and independently, and unconnected with each other. Of course, it is left to the Regional Transport Authority's discretion, as to which application he should take up first for consideration.

In the result, the writ petition is dismissed. But there will be no order as to costs.

V.K. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE T. VENKATADRI.

The Salem Fairlands Co-operative House Building Society Ltd. by its Secretary .. *Petitioner**

v.

R. Sugunaleelavathi Ammal and others .. *Respondents.*

Interpretation of Statutes—Bye-law made by a Co-operative society—Benevolent construction—When can be treated as ultra vires.

A bye-law made by a co-operative society ought to be benevolently interpreted, unless it is manifestly unjust or disclosed bad faith. Only when the bye-laws are uncertain and unreasonable, they should be treated as *ultra vires*. A bye-law is liable to be declared void if it is not certain and positive in its terms, *i.e.*, if it does not contain adequate information as to what it requires or forbids to be done, so that persons affected may be in no doubt as to what they are required to do or abstain from doing, and as to the penalty for non-compliance. Generally, Courts are averse to declaring bye-laws of this kind bad, on the ground of their being unreasonable.

In the instant case the impugned bye-law of the building society has specifically stated that if the member does not commence construction of the house within six months from the date of allotment of the site, it shall be competent to the Board of Directors to cancel the allotment and re-allot the plot to another member. It certainly means that the construction should be started within the time stipulated and completed within a reasonable time. Such a bye-law cannot be said to be not specific and wanting in some respects.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records of the order in C. M. A. No. (C.S.) 1 of 1963, dated 20th November, 1964 on the file of the 3rd Respondent and quash the said order and made therein.

* W. P. No. 496 of 1965. 31st October, 1967.

S. T. Ramalingam for *G. Ramanujam* and *S. Jagadisan*, for Petitioner.

S. V. Venugopalachari, for Respondent No. 1.

J. Kanakaraj, for Respondent No. 2.

The Court made the following

ORDER.—The Salem Fairlands Co-operative House Building Society Limited has, by its Secretary, filed this writ petition to call for the records in C. M. A. No. (C.S.) 1 of 1963 on the file of the Co-operative Tribunal, Salem (District Judge, Salem) and quash the order dated 20th November, 1964.

The Salem Fairlands Co-operative House Building Society Limited is a Society registered under Act VI of 1932. The object of the Society is to carry on for the benefit of its members the trade of building and of buying, selling, hiring, letting and developing land in accordance with co-operative principles and to give loans to members for construction of new dwelling houses. In respect of it, the Society has framed by-laws, and By-law 37 (*b*), with which we are concerned in this petition, provides :

> " A member who has under by-law 37 (*a*) exercised the option of constructing the house himself or herself shall apply for a Government loan through the Society within the period of six months from this date. (Date of registration of this amendment or date of allotment of site whichever is later). However if the member does not choose to apply for a Government loan, he or she shall commence the construction of the house according to the designs approved by the Board of Directors within six months from this date. If the member neither applies for the loan nor commences construction of the house within six months from this date (date of registration of this amendment or date of allotment of the site whichever is later) it shall be competent to the Board of Directors to cancel the allotment and re-allot the plot to another member.".

The first respondent in this petition was admitted as a member of the petitioner-Society on 29th March, 1959 and was allotted plot B-1 for the construction of a house. Eversince the allotment of the plot to the first respondent, there was continuous correspondence between the Society and the allottee for nearly three years. It is unnecessary to state in detail the nature of the correspondence that passed between them; suffice it to say that the crux of the correspondence seems to be that, while the Society was insisting upon the allottee constructing the building as expeditiously as possible, the first respondent has been evading, dodging and deliberately neglecting the construction of the house, as per bye-law relating to construction, on some pretext or other. When the Society started questioning the conduct of the first respondent in postponing construction of the house, she pretended to start construction by digging the ground and excavating some earth for the proposed foundation and also partly digging a well. After waiting for sufficient time, the Board of Directors of the Society got exasperated at the conduct of the first respondent. They convened a meeting on 8th January, 1962, and resolved to issue notices to 18 defaulters including the first respondent herein to show cause why the allotment should not be cancelled for non-compliance in spite of repeated reminders. This notice was served on the first respondent on 15th January, 1962. The first respondent replied on 26th January, 1962 to the Board's previous letter dated 25th December, 1961, but did not refer at all to the communication dated 8th January, 1962. Finally the Board of Directors of the Society met on 15th February, 1962 and cancelled the allotment made to the first respondent and also resolved to re-allot the same. The plot in question was allotted thereafter to the second respondent on 19th July, 1962.

Thereupon, the first respondent filed an arbitration claim before the Deputy Registrar of Co-operative Societies, Salem, under section 51 of the Madras Co-operative Societies Act, 1932. He found that the first respondent violated bye-law 37 (*b*) of the Society, in the matter of the construction of the house, that the resolu-

tion of the Board of Directors was passed without any bias or ulterior motive and was therefore fully justified. In the end, he dismissed the claim of the first respondent. On appeal to the Co-operative Tribunal, Salem (District Judge, Salem), the learned Tribunal allowed the Appeal and set aside the order of the Deputy Registrar. The Tribunal has observed that if the bye-law is not specific, if the bye-law is wanting in some respects, if the bye-law does not specify the time within which the building should be completed, it is not for the Registrar or for the Court to interpret the bye-law in a way advantageous to the Societies or disadvantageous to the members. He held that the first respondent did not come within the mischief of bye-law 37 (*b*) and that therefore the allotment in favour of the second respondent by the Society was incompetent. It is to quash this order of the Tribunal, the Society has filed this petition under Article 226 of the Constitution.

Dealing with bye-laws, Edward Beal in his book on Cardinal Rules of Legal Interpretation (1908 Edition) says at pages 405-406:

> " By-law or bye-law is the Scandinavian *byr* (hamlet) a law made by a hamlet or township for the regulation of its own affairs. In Scotland those laws are called laws of *birlaw* or *burlaw*, which are made by neighbours elected by common consent in the birlaw Courts. Every by-law must be *legi, fidei rationi consona*. If it be lawful and reasonable, it will be good........A by-law, not reasonable in any respect, will be void."

Lord Russel of Killowen, C. J. in the classical case on the subject—*Kruse* v. *Johnson*[1] observed:

> " A by-law..........I take to be an ordinance affecting the public, or some portion of the public, imposed by some authority clothed with statutory powers ordering something to be done or not to be done, and accompanied by some sanction or penalty for its non-observance. It necessarily involved restriction of liberty of action by persons who come under its operation as to acts which but for the by-law, they would be free to do or not do as they pleased. Further, it involves this consequence—that, if validly made, it has the force of law within the sphere of its legitimate operation........"

In *De Morgan* v. *Metropolitan Board of Works*[2], Lush, J., said:

> " By-laws are a code of restrictions,"

Commenting on this observation, it is stated in Craies on Statute Law at page 297 (foot-note) that such restrictions are restrictions on the liberty of residents in the locality to which they apply. These bye-laws are regulations made by public bodies, municipal corporations and registered societies. Only when the bye-laws of building societies are uncertain and unreasonable, they should be treated as *ultra vires*. A bye-law is liable to be declared void if it is not certain and positive in its terms, *i,e.*, if it does not contain adequate information as to what it requires or forbids to be done, so that persons affected may be in no doubt as to what they are required to do or abstain from doing, and as to the penalty for non-compliance. Generally, Courts are averse to declaring bye-laws of this kind bad, on the ground of their being unreasonable. Lord Hobhouse said in *Slattery* v. *Naylor*[3]:

> " But in determining whether or no a bye-law is reasonable, it is material to consider the relation of its framers to the locality affected by it, and the authority by which it is sanctioned."

In this connection, it is also worthwhile to remember the passage of Lord Russel of Killowen in *Kruse* v. *Johnson*[1]:

> " ....when the Court is called upon to consider the bye-laws of public representative bodies clothed with the ample authority which I have

1. L.R. (1898) 2 Q.B. 91 at 99.
2. L.R. (1880) 5 Q.B.D. 155 at 158.
3. L.R. (1838) 13 A.C. 446 at 452.

described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such bye-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. This involves the introduction of no new cannon of construction. But, further, looking to the character of the body legislating under the delegated authority of parliament, to the subject-matter of such legislation, and to the nature and extent of the authority given to deal with matters which concern them, and in the manner which to them shall seem meet, I think Courts of justice ought to be slow to condemn as invalid any bye-law, so made under such conditions, on the ground of supposed unreasonableness.... But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*. But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A bye-law is not unreasonable merely because particular Judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some Judges may think ought to be there."

On a review of the case-law above mentioned, I am of opinion that a bye-law made by a Society ought to be benevolently interpreted, unless it is manifestly unjust or disclosed bad faith. The particular bye-law has specifically stated that if the member does not commence construction of the house within six months from the date of allotment of the site, it shall be competent to the Board of Directors to cancel the allotment and re-allot the plot to another member. It certainly means that the construction should be started within the time stipulated and completed within a reasonable time. Such a bye-law cannot be said to be not specific and wanting in some respects. In the instant case, the Directors have waited for more than 24 months thereby giving the first respondent ample time and opportunity to make the construction. But she deliberately postponed the construction of the building. In such circumstances, the Board of Directors have acted within their rights in canncelling the allotment made to her and re-allotting the plot to the second respondent herein.

For the foregoing reasons, the writ petition is allowed, the order of the Co-operative Tribunal set aside and that of the Deputy Registrar restored. There will be no order as to costs.

V.K. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE N. KRISHNASWAMY REDDY.

Natesan .. *Petitioner.**

Evidence Act (I of 1872), sections 21 and 24—First information to police by accused—Admissions contained in—Admissibility against accused.

If the first information given to a police officer amounts to a confession any incriminating fact mentioned therein, if it has got a bearing either directly or indirectly with the confession, such fact, even though it may be an admission, will be inadmissible. If, on the other hand, the first information does not amount to a confession, any admission made therein can be proved against the maker thereof under section 21 of the Evidence Act.

In the instant case the first information by the driver of the lorry, later charged with rash and negligent driving under section 304-A of the Penal Code, does not amount to a confession. He has only given an explanation as to how the accident occurred. Therefore the admission therein that he was driving the vehicle at the time of the accident is admissible against him.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of Sessions, South Arcot Division, Cuddalore, in C.A. No. 7 of 1966 (C.C. No. 268 of 1965 on the file of the Court of the Sub-Divisional Magistrate, Ulundurpet).

S. Mohan Kumaramangalam for *G. M. Ramachandran, V. Gopinath, R. Kulandaivelu* and *R. Ganesan*, for Petitioner.

Calvin Jacob, for the Public Prosecutor, for State.

The Court made the following.

ORDER.—The petitioner was convicted under sections 304—A and 337, Indian Penal Code, and sentenced to rigorous imprisonment for one year under the former section, by the Sub-Divisional Magistrate of Ulundurpet. No separate sentence was awarded under section 337, Indian Penal Code. On appeal the Sessions Judge, South Arcot, confirmed the conviction and sentence.

The prosecution case is briefly this : On the night of 17th September, 1965 at about 3 A.M., P.Ws. 1, 2 and 3 were travelling in two carts laden with manure leaves from Sathanur towards Ulundurpet through the G.S.T. Road proceeding from south to north. P.W. 1 was driving the first cart and the deceased Samikannu and another person were sitting on the top of the leaves in that cart which was followed by the cart driven by P.W. 2 in which P.W. 3 and another person were seated on the top of the leaves. The lorry MDS. 6721 driven by the petitioner was coming behind the two carts and suddenly dashed against the cart driven by P.W. 2 and then against the other cart. The occupants of both the carts were thrown out. Samikannu and three bulls died. The other occupants were injured. The lorry stopped after proceeding some distance northwards and after hitting against a tree on the left side of the road. The petitioner appeared at the Ulundurpet Police Station at 5 A.M. and reported the occurrence to P.W. 6, the Head Constable who recorded Exhibit P-6 statement from him.

The learned Counsel appearing for the petitioner Sri Mohan Kumaramangalam does not dispute the finding of the lower appellate Court that due to the negligent driving of the driver of the lorry, Samikannu and the three bulls were killed and P.Ws. 1 to 3 were injured. But his contention is that there is no acceptable evidence that the petitioner drove the lorry at the time of the accident. The prosecution witnesses were unable to say as to who drove the lorry at the time of the accident as it was dark. The prosecution relied upon Exhibit P-6, the statement given by the petitioner in which he stated as follows :

*Crl. R.C. No. 443 of 1966
(Crl. R.P. No. 437 of 1966). 15th November, 1967.

"I am a resident of Namakkal. On the night of 16th September, 1965, at about 9 P.M. I was driving the lorry M.D.S. 6721 on hire from Namakkal, loaded with paper rolls and was transporting it to Hindu Company. On the way to Madras in G.S.T. Road, at about 4 A.M. while I was coming at a distance of about 3 miles, south of Ulundurpet, two double bullock carts were going in front of me. I sounded horn. They turned the aforesaid carts towards the right side. When I also turned right side, to overtake them, the aforesaid lorry dashed against the aforesaid cart that was going behind and the said cart got crushed and one of the bullocks, tied to it, died. The person who was in the front cart, also died. Others also received injury. I got frightened and went straight away to the Police Station."

He has admitted in this statement that he was taking the lorry and at about 4 A.M. he saw two carts going ahead, that he blew the horn and that the cartmen turned their carts towards right and the lorry dashed against the carts going behind, with the result that the man in the cart and one bull died.

It is clear from this statement that the petitioner was driving the lorry at the time of the accident. The learned Counsel for the petitioner contended that this statement would amount to a confession and that as such, any admission contained in such a confessional statement is inadmissible. In other words, he submitted that if the statement given before a Police Officer amounts to a confession, no admission of a fact will be admissible though such admission of a fact taken by itself may be innocuous ; since every fact contained therein will have a bearing on the confession itself. Reliance has been placed by the learned Counsel on the following passage in *A. Nagesia* v. *Bihar State*[1] (at p. 124) :

"Now, a confession may consist of several parts and may reveal not only the actual commission of the crime but also the motive, the preparation, the opportunity, the provocation, the weapons used, the intention, the concealment of the weapon and the subsequent conduct of the accused. If the confession is tainted, the taint attaches to each part of it. It is not permissible in law to separate one part and to admit it in evidence as a non-confessional statement. Each part discloses some incriminating fact, *i.e.*, some fact which by itself or along with other admitted or proved facts suggests the inference that the accused committed the crime, and though each part taken singly may not amount to a confession, each of them being part of a confessional statement partakes of the character of a confession. If a statement contains an admission of an offence, not only that admission but also, every other admission of an incriminating fact contained in the statement is part of the confession."

The position appears to be this : If the first information given to a Police Officer amounts to a confession, any incriminating fact mentioned therein, if it has got a bearing either directly or indirectly with the confession, such fact, even though it may be an admission, will be inadmissible. If the first information does not amount to a confession, any admission made therein can be proved against the maker under section 21 of the Evidence Act. The Supreme Court in *Faddi* v. *State of Madhya Pradesh*[2], in dealing with the admissibility of first information report given by an accused before a Police Officer observed as follows :

"Admissions are admissible in evidence under section 21 of the Indian Evidence Act. Section 17 defines an admission to be a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, thereafter mentioned in the Act. Section 21 provides that admissions are relevant and may be proved as against a person who makes them. Illustrations (*c*), (*d*) and (*e*) to section 21 are of the circumstances in which an accused could prove his own admissions which go in his favour in view of the exceptions mentioned in section 21 to

1. (1966) 1 S.C.J. 193 : (1966) M.L.J. (Crl.) 124 : (1966) 1 S.C.R. 134 : A.I.R. 1966 S.C. 119.
2. (1965) 1 S.C.J. 203 : (1965) M.L.J. (Crl.) 93 : (1964) 5 S.C.R. 312 : A.I.R. 1964 S.C. 1850.

the provision that admissions could not be proved by the person who makes them. It is therefore clear that *admissions of an accused can be proved against him.*"

It, therefore, becomes necessary to consider whether Exhibit P-6 the first information given by the petitioner to P.W. 6 the Police Officer amounts to a confession. Both the Courts below found that Exhibit P-6 does not amount to confession. I have gone through the statement which is in Tamil carefully, the translation of which is extracted above, and I am of the view that it does not amount to confession. On the other hand, he has given an explanation as to how the accident had occurred. He stated that he sounded horn and the bullock carts turned towards the right side and that, therefore, the lorry dashed against the carts. There is nothing to show in that statement to indicate that he confessed to an offence. He has not stated that he drove the vehicle rashly or negligently or that he was responsible for the accident. I, therefore, find that the report Exhibit P-6 made to P.W. 6 by the petitioner is not a confession. Therefore, the admission by the petitioner in Exhibit P-6 that he sounded horn and that the bullock carts turned towards the right side and he also turned right side and the lorry dashed against the carts, indicating thereby that he was driving the vehicle is admissible. The finding by the lower Courts that the petitioner was driving the vehicle negligently, as a result of which one person was killed, three bulls died and the witnesses were injured, was not seriously challenged. The conviction of the petitioner under sections 304-A and 337, Indian Penal Code, is, therefore, confirmed.

So far as the sentence is concerned, I am inclined to take a lenient view. The occurrence took place at about 3 A.M. on 17th September, 1965, which was more than two years from now. It appears, the petitioner has a good record of service. It is of course unfortunate that one person was killed. He has been in jail for about a week. Taking all the circumstances into consideration, I reduce his sentence of imprisonment to the period already undergone ; but instead, I sentence him to pay a fine of Rs. 300 in default to undergo rigorous imprisonment for one month under section 304-A, Indian Penal Code. Time for payment one month from this date.

The revision case is dismissed with the modification in sentence.

V.K. *Revision case dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. S. KAILASAM.

The Public Prosecutor .. *Appellant**

v.

Abdul Wahab and others .. *Respondents.*

Electricity Act (IX of 1910), sections 39 and 50—Interpretation—Prosecution of a person for an offence under the Act to be instituted by the Government or by a "person aggrieved"—Chief Engineer of the Electric Supply Corporation, if an aggrieved person—Chief Engineer authorised to act on behalf of the Corporation by the managing agents—Power-of-attorney in accordance with the Memorandum and Articles of Association—No break in the managing agency —Prosecution at the instance of the person aggrieved (responsible officer)—Dishonest consumption of electrical energy—Offence under the Act, section 39.

Section 50 of the Indian Electricity Act 1910, *inter alia* provides that no prosecution shall be instituted against any person for any offence against this Act or any rule, licence or order, thereunder, except at the instance of the Government or an Electric Inspector, or of a person aggrieved by the same.

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* Crl. Appeal No. 432 of 1961. 9th August, 1967.

Is the Chief Engineer, Kumbakonam Electric Supply Corporation, who permitted a temporary connection to the accused's house and who made the complaint against the appellant (accused) was the "person aggrieved" within the meaning of section 50?

A power-of-attorney was executed by the Managing Agents (India Company (Private) Ltd.) empowering the Chief Engineer to act on behalf of Kumbakonam Electric Supply Corporation. The power-of-attorney is in accordance with the powers conferred on the Managing Agents under Article 85 of the Articles of Association. After the execution of the power-of-attorney on 25th April, 1960, the managing agency agreement was renewed, as the agency was terminated by virtue of section 330 of the Companies Act, 1956. This re-appointment will not in any way affect the validity of the power-of-attorney. In view of the fact that there has been no break in the managing agency of the company and that the powers-of-attorney executed by the managing agency in 1955 would continue to be in operation till it is revoked, it has to be held that the appointment of the Chief Engineer as the power-of-attorney agent of the managing agents would empower him to act on behalf of the company also. From the Memorandum and Articles of Association and from the instrument appointing the Chief Engineer of the power-of-attorney, it is clear that the Chief Engineer was acting as the power-of-attorney agent of the Kumbakonam Electric Supply Corporation and the prosecution is at the instance of the person aggrieved.

Further where the prosecution is instituted by a responsible officer the Chief Engineer of the Corporation, the requirements of section 50 of the Indian Electricity Act, 1910, that the institution of the prosecution should be 'at the instance of' the aggrieved person, is satisfied.

It was held already before remand that there has been dishonest consumption of electrical energy (an offence under section 39 of the Electricity Act), therefore a finding of guilty under the said section 39 is recorded.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid Respondent No. 1 (accused No. 1) of an offence under section 379, Indian Penal Code read with section 39 of the Indian Electricity Act and also under section 44 (*c*) and (*d*) of the Indian Electricity Act and of the aforesaid Respondents Nos. 2 to 6 (accused Nos. 2 to 6) of an offence of abetment of those offences punishable under the said sections read with section 109, Indian Penal Code, by the Sub-Magistrate (Judicial), Papanasam in C.C. No. 1528 of 1960.

The Assistant Public Prosecutor, for the Public Prosecutor, for Appellant.

V. T. Rangaswamy Iyengar for *K. Hariharan*, for 1st Respondent (accused No. 1).

The Court made the following

ORDER.—This appeal is remanded by the Supreme Court for determination of the question whether the appellant (before the Supreme Court) is guilty of an offence under section 39 of the Indian Electricity Act, 1910, as the question whether the Chief Engineer, Kumbakonam Electric Supply Corporation was the "person aggrieved" had not been determined by this Court.

Six persons were tried by the Sub-Magistrate of Papanasam for an offence, under section 379, Indian Penal Code read with section 39 of the Indian Electricity Act, 1910 and section 44 (*c*) and (*d*) of the said Act. All the accused were acquitted by the Sub-Magistrate and the State filed an appeal against the order of acquittal. During the hearing of the appeal in this Court, it was submitted that the prosecution of an offence alleged to have been committed by the accused under section 39 of the Indian Electricity Act could not be instituted except at the instance of an "aggrieved person". The question whether dishonest abstraction, consumption or use of electrical energy which was deemed to be theft by virtue of section 39 of the Indian Electricity Act, 1910, will amount to an offence against that Act, or one under section 379 of the Indian Penal Code, was referred to a Full Bench. The Full Bench [1] answered the reference as follows:

1. The decision of the Full Bench is reported in (1965) M.L.J. (Crl.) 51: I.L.R. (1964) 1 Mad. 653.

"The offence of dishonest abstraction, consumption or user of electricity will not be one coming within the mischief of section 50 of the Indian Electricity Act, but one under section 379 of the Indian Penal Code read with section 39 of that Act."

After the expression of this opinion by the Full Bench, *viz.*, the offence was one under the Indian Penal Code and hence section 50 of the Indian Electricity Act, 1910, had no application, the preliminary objection that "the person aggrieved" had not launched the prosecution did not arise. On the facts, this Court allowed the appeal against the first accused alone holding him guilty under section 379, Indian Penal Code, read with section 39 of the Indian Electricity Act, 1910. On appeal, the Supreme Court, in view of its decision in *Avatar Singh* v. *State of Punjab*[1], holding that "dishonest abstraction of the electricity mentioned in section 39 of the Act cannot be an offence under the Indian Penal Code", set aside the conviction of the appellant under section 379, Indian Penal Code. But as the petitioner was also charged under section 39 of the Indian Electricity Act and as the questions whether the accused was guilty or not under section 39 of the Indian Electricity Act, 1910 and whether the Chief Engineer, on the facts of the case, may be regarded as the "person aggrieved" to enable him to institute the proceeding, were not considered by this Court, the Supreme Court remanded the case with a direction that the question whether the appellant was guilty of an offence under section 39 of the Indian Electricity Act, 1910 may be determined. In pursuance of this remand, the matter comes up before this Court for disposal.

The learned Public Prosecutor at the time of the hearing of the appeal, requested that he may be permitted to adduce additional evidence and mark certain documents. That petition was ordered, as it was felt that in the circumstances of the case, the material documents should be permitted to be marked in evidence and that the Chief Engineer, Kumbakonam Electric Supply Corporation should be examined. The Chief Engineer was accordingly examined by this Court, and Exhibits P-16 and P-17 were filed.

Section 50 of the Indian Electricity Act, 1910, provides as follows :

"No prosecution shall be instituted against any person for any offence against this Act or any rule, license or order, thereunder, except at the instance of the Government or an Electrical Inspector, or of a person aggrieved by the same."

In this case, the licensee is the Kumbakonam Electric Supply Corporation and the question is whether the prosecution is instituted by "a person aggrieved".

The accused applied for a temporary connection by Exhibit P-2 to the Kumbakonam Electric Supply Corporation for the purpose of illuminating a marriage *pandal.* Under Exhibit P-3, dated 1st September, 1960, the Kumbakonam Electric Supply Corporation permitted a temporary connection to the accused's house. In this communication, P.W. 1, the Chief Engineer had signed "for the Kumbakonam Electric Supply Corporation". In the complaint, Exhibit P-4, P.W. 1 did not state that he was signing on behalf of the Kumbakonam Electric Supply Corporation, though he has signed the complaint. Exhibit P-4, however, states that the complainant is the Chief Engineer of the Kumbakonam Electric Supply Corporation.

The agreement for the temporary service connection was signed by the first accused and P.W. 1, K.S. Seshadri, Chief Engineer, for Kumabakonam Electric Supply Corporation . The Memorandum and Articles of Association of the Kumbakonam Electric Supply Corporation, Ltd., is marked as Exhibt P-16. Provision is made for the appointment of Managing Agents by Articles 83 to 88. Article 84 provides that the India Company (Private) Ltd. the first Managing Agents of the Company and who have been re-appointed Managing Agents of the Company for a further period of ten years on and from 1st January, 1950, shall continue and be the Managing Agents of the Company. Under Article 85, the Managing Agents

1. (1965) 2 S.C.J. 137 : (1965) M.L.J. (Crl.) 449 : (1965) 1 S.C.R. 103.

have been given full power and authority to appoint all or any attorneys and managers, engineers, officers, fitters, servants, or agents for the services of, and on behalf of the company. Under Exhibit P-1, P.W. 1, was appointed as the general power-of-attorney agent. On 25th April, 1960, Kumbakonam Electric Supply Corporation Ltd., and the India Company (Private) Ltd. entered into an agreement by which India Company (P.) Ltd. was appointed as Managing Agents. It is recited that notwithstanding the appointment of India Company (P.) Ltd., as the Managing Agents till 14th April, 1961, the said appointment became terminated by virtue of section 330 of the Companies Act, 1956, on the 15th of August, 1960. Kumbakonam Electric Supply Corporation and India Company (P.) Ltd. mutually agreed that India Company (P.) Ltd., be appointed as Managing Agents from 15th August, 1960 to 15th August, 1965. It was during this period that the offence was committed and the complaint was given by P.W. 1.

It will be seen that under the Article of Association, the Managing Agents have the power and authority to appoint attorneys and managers, engineers, officers, etc., for the services of and on behalf of the Company. When an attorney, manager or officer is appointed by the Managing Agents, his services are for and on behalf of the company. By the appointment under Exhibit P-1, P.W. 1 is entitled to act as an attorney or agent for and on behalf of the company.

The contention of the learned Counsel for the accused is that by Exhibit P-1, the Managing Agents appointed P.W. 1, as the power-of-attorney of India Company(P.) Ltd., and not on behalf of Kumbakonam Electric Supply Corporation. In support of this contention, the learned Counsel referred to certain passages in Exhibit P-1 and submitted that the appointments could not be on behalf of Kumbakonam Electric Supply Corporation. He also submitted that as the power-of-attorney was executed in the year 1955 and as the Managing Agents were re-appointed in 1960, the power-of-attorney executed in the year 1955 would not be valid. It was contended on behalf of the accused that the person aggrieved is the Kumbakonam Electric Supply Corporation and a complaint should have been filed by the Company itself by passing a special resolution authorising any person to do so, and in the absence of a specific authorisation, P.W.1, the Chief Engineer, cannot be said to be acting at the instance of the Company. The learned Counsel referred to the general power-of-attorney Exhibit P-1, and submitted that the appointment of P.W.1. was as the attorney for the Managing Agents. He relied on the phrase "to be our attorney in our name and on our behalf". The mention of the word " company" in the document, it was submitted, would refer to India Company (P.) Ltd. and not the Kumbakonam Electric Supply Corporation. On a careful examination of the general power-of-attorney, I am unable to accept this contention. It may be seen that under Article 85 of the Articles of Association, the Managing Agents have been empowered to appoint attorneys and managers, engineers, or officers, to act for and on behalf of the company. The Articles of Association and the Agreement between the Kumbakonam Electric Supply Corporation and India Company (P.) Ltd., referred Kumbakonam Electric Supply Corporation, as the Company and India Company (P.)-Ltd., as the Managing Agents. In Exhibit P-1, the power-of-attorney, the words "a company registered under the Indian Companies Act, 1913, and having its registered office at Oriental Building, Armenian Street, Madras," would refer to the Kumbakonam Electric Supply Corporation. This is made clear by the recital to be our attorney in our name and on our behalf to do all or any of the following acts or things to the intent that the powers conferred shall extend to all matters in which the Company is now or may hereafter become interested". The phrase "to be our attorney in our name and on our behalf" would certainly refer to India Company (P.), Ltd. But the phrase "the powers conferred shall extend to all matters in which the company is now or may hereafter become interested" would refer to the Kumbakonam Electric Supply Corporation. Under clause (1) of the power-of-attorney, P.W. 1 is authorised to give a discharge in respect of any property to which the company may be entitled to and to effect a compromise or release of any claim in respect of all property, money, securities and rights. A distinction between a claim of the company and a claim

against "us" (The India Company (P.) Ltd.) is discernible. Clause (5) of the powers-of-attorney makes the position clear, for it empowers P.W. 1 to present for registration on behalf of the company any document executed by Sri C.R. Ramaswamy signing on behalf of India Company (P.) Ltd., as managing agents of the Kumbakonam Electric Supply Corporation, and to admit execution thereof, etc. A distinction is, therefore, maintained between the company and the Managing Agents, and P.W. 1, is authorised to present for registration any instrument or deed on behalf of the Company executed by Sri C.R. Ramaswamy signing on behalf of the India Company (P.) Ltd.

It is clear that the power-of-attorney was executed by the Managing Agents empowering P.W. 1 to act on behalf of Kumbakonam Electric Supply Corporation. The power-of-attorney is in accordance with the powers conferred on the Managing Agents under Article 85 of the Articles of Association. No doubt, after the execution of the power-of-attorney on 25th April, 1960 the managing agency agreement was renewed, as the agency was terminated by virtue of section 330 of the Companies Act, 1956. This re-appointment will not in any way affect the validity of the power-of-attorney. In view of the fact that there has been no break in the managing agency of the company and that the power-of-attorney executed by the Managing Agency in 1955 would continue to be in operation till it is revoked, it will have to be held that the appointment of P.W. 1 as the power-of-attorney agent of the Managing Agents would empower him to act on behalf of the Company also. On a reading of Exhibits P-16 and P-17 and also Exhibit P-1, I am satisfied that P.W. 1 was acting as the power-of-attorney agent of the Kumbakonam Electric Supply Corporation and the prosecution is at the instance of the aggrieved person.

It is admitted that the company did not file any complaint or pass any resolution authorising any person to file a complaint. But in the circumstances stated above, I find that the absence of such complaint or resolution will not invalidate the proceedings.

The learned Counsel for the accused submitted that P.W.1 in his cross-examination in the trial Court admitted that he gave the complaint as the Chief Engineer and not as the power-of-attorney agent. This admission is relied on for submitting that the complaint was not given as the power-of-attorney agent. When his attention was drawn to this statement in his cross-examination in this Court, P.W. 1 replied that the power-of-attorney was already there and it could speak for itself. He wanted to impress by saying that he signed the complaint as Chief Engineer because he was responsible for any loss to the company. What P.W. 1 had stated in the evidence would not in any way affect the legal position. The mere fact that P.W. 1 stated that he gave the complaint as the Chief Engineer and not as the power-of-attorney agent would not alter the position. If the power-of-attorney was in force, as it had been found to be, he would be acting on behalf of the company and would be a person competent to institute the complaint.

Even assuming, that P.W. 1, was not a power-of-attorney agent, in the circumstances of the case, it can be found that P.W. 1 was acting at the instance of Kumbakonam Electric Supply Corporation. That P.W. 1 was acting on behalf of the Kumbakonam Electric Supply Corporation is clear from Exhibit P-3, the temporary permit granted to the accused. Though Exhibit P-4 was signed by P.W. 1 without specifically stating that it was on behalf of the company, it was given by P.W. 1 as the Chief Engineer of the Kumbakonam Electric Supply Corporation. Exhibit P-12, the agreement between the Kumbakonam Electric Supply Corporation and the accused, is signed by P.W. 1 for the Kumbakonam Electric Supply Corporation as its Chief Electrical Engineer. The documents referred to above clearly show that P.W. 1 as Chief Engineer of the Corporation, was acting on its behalf.

The meaning of the phrase "at the instance of" is given in the Chambers Dictionary as "at the motion or solicitation of". In P. Ramanatha Iyer's Law

Lexicon, the same meaning is given. In *Viswanath* v. *Emperor*[1], a bench of the Court stated that the phrase "at the instance of" means merely "at the solicitation of or at the request of", that it had been introduced so as to make the provision a general one and that if it had been the intention of the legislature that no case should be instituted in Court except by the Electrical Company itself or other persons mentioned in section 50 of the Act, the Legislature would have used the ordinary phrase "on the complaint of" and the section would have been on the lines that no Magistrate should take cognizance of any offence referred to in section 50 of the Act, except upon the complaint of certain persons. The Court further held that the prosecution should not be instituted by some independent busy-body who had nothing to do with the matter. The officers of the company discovered the theft and reported it to the police to make an investigation. In the circumstances, the Court held that the officers intended that prosecution should follow according to the result of the investigation and concluded that the prosecution was at the instance of the Electric Company. This decision would support the view that the phrase "at the instance of" should be given a wider meaning and it was intended for the purpose of excluding independent persons who had nothing to do with the company from giving a complaint. A complaint by reasonable officers of the company, even though there is no specific authorisation, would be "at the instance of" the company. In *Bhagalpur Electric Co.* v. *Hari Prasad*[2], following the decision in *Viswanath* v. *Emperor*[1], the Court expressed its opinion that when a responsible officer of a company reports an offence to the police and a prosecution is therefore set on foot, that will be considered to be a prosecution instituted "at the instance of" the company. It is no doubt true that in the case cited, the complaint was presented by the residential engineer after obtaining an authorisation from the Managing Agents, and therefore the observations will be in the nature of an *obiter dicta*. In *Provincial Government, C.P. & Berar* v. *Yoganandam*[3], a Bench of the Court was of the view that the expression "at the instance of" does not mean "on the complaint of" or "with the sanction of" but only means "at the asking" or "the suggestion of" and the object of using that phrase was only to prevent indiscriminate prosecutions by persons without any expert knowledge of the working of electricity. In *State* v. *Maganlal Chunilal*[4], a Bench of the Bombay High Court was of the view that the object of the legislature was that only persons aggrieved may set the law in motion, and in the case before the Court one Mr. Gore, the officer who acted for and on behalf of the Company having set the law in motion, the prosecution must be regarded as having been instituted at the instance of the Company. In this case also, sanction was obtained from the head office to lodge a complaint and therefore the observations are in the nature of an *obiter dicta*. In the four cases cited above, the Courts have taken the view that when the law is set in motion by a responsible officer for and on behalf of the company, the prosecution should be regarded as having been instituted at the instance of the company.

The learned Counsel for the accused relied on the decision in *Dhoolchand* v. *State*[5], wherein it was held by the Rajasthan High Court that the Superintendent, Electrical and Mechanical Department of the Government does not come within the meaning of the words "Government" or "Electric Inspector", as he is only a paid servant of the Government and he cannot be said to have been aggrieved at the offence. The case can be distinguished on the facts, in that, the officer did not verify the truth of the complaint and left it to the police to check up and do the needful. Further, there is nothing in the evidence to show that the officer was acting on behalf of the Government. On a consideration of the authorities cited before me, I am of the view that when a prosecution is instituted by a responsible officer of the company, the requirement of section 50 of the Indian Electricity Act, 1910, that the institution of the prosecution should be at the instance of the aggrieved person is satisfied.

1. A.I.R. 1936 All. 742.
2. A.I.R. 1938 Pat. 15.
3. A.I.R. 1944 Nag. 330.
4. A.I.R. 1956 Bom. 354.
5. (1957) 58 Crl. L.J. 233.

In this case, P.W. 1, the Chief Engineer has stated that he was in entire charge of the administration of the Corporation including the Accounts Department. It is also clear that he was acting on behalf of the Corporation by signing agreement forms for giving connections to applicants. I accept the testimony of P.W. 1 and find that he was acting on behalf of the company, and as a responsible officer, he instituted the prosecution before the police. The signing of the complaint by P.W. 1 as K. S. Sheshadri without mentioning that he did so on behalf of the Corporation would not make any difference, because, in the complaint itself he had stated that he was the Chief Engineer of the Corporation. I am satisfied that in the circumstances of the case, the requirement that the institution of the prosecution should be at the instance of the aggrieved person had been satisfied. There can therefore be no impediment in holding that the accused is guilty of an offence under section 39 of the Indian Electricity Act, 1910, and the order of remand is answered accordingly.

Mr. V. T. Rangaswamy Iyengar requested the Court to go into the facts and consider the question whether an offence under section 39 of the Indian Electricity Act, 1910 had been made out. This request is beyond the scope of the remand, for, what is directed to be decided is the question whether the Chief Engineer of the Corporation may, on the facts of the case, be regarded as the person aggrieved, as the said question had not been determined by the High Court.

On a consideration of the facts before the remand by the Supreme Court, this Court allowed the appeal of the State in so far as the first accused is concerned and held that he was guilty of dishonest consumption of electrical energy. This is an offence under section 39 of the Indian Electricity Act, 1910. A finding is therefore recorded that the accused is guilty of an offence under section 39 of the Indian Electricity Act, 1910.

V.M.K. *Findings recorded accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

The State of Madras, represented by the Collector of Ramanathapuram at Madurai .. *Appellant**

v.

Sri Sathya Bodha Swamy, Utharathi Mutt, Thenparai, Tanjore District, Trustee of Brindhavanam Agraharam-Manamadurai, through his authorised agent, Sri G. V. Gopalachar, Gangur .. *Respondent.*

Rent Reduction Act (Madras Act XXIX of 1947) *and the Madras Estates Abolition Act (XXVI of* 1948)*—Rent, whether includes cess—Government to collect cess from tenants as rents after taking over of estate from landholder—Liability of Government to account limited to moneys actually collected and not for moneys not realised.*

The Rent Reduction Act is generally a prelude to the taking over of the estate under the Abolition Act (XXVI of 1948) and once the village is notified under the Rent Reduction Act, even the arrears of rent can be realised only by the State and the landlord is interdicted from collecting any rents from the tenants. The Estates Land Act would include cess in the definition of rent for the purpose of giving a charge to the landholder for the same and also for the purpose of recovering it. While the Rent Reduction Act does not define rent, it takes away from the landholder the power of recovering rent. On the abolition of an estate the Government is entitled to take possession with the estate of all accounts, registers, muchilikas, etc. relating to the estate which the Government may require for administration thereof. If, in such circumstances, the landholder is to be left to his own resources to recover the cess, the practical difficulties and inconvenien-

* S.A. No. 1785 of 1962. 5th January, 1967.

ces will be insurmountable. It is a rule of interpretation to presume the intention which appears to be most in accord with convenience, reason, justice and legal principles, particularly when there is doubt as to the true one. There are provisions in the Rent Reduction Act which make it plain that where the context so require, even as in the Estate Land Act, the rent would include cess. The landlord is entitled to recover from the tenant half the cess due on the land, and the Government from the total recovery, deducts the entirety of the cess due by the landholder. The Act contemplates that the State itself shall collect the cess also due from the tenants as rent, after the estate has been taken away from the landholder.

The liability of the State that is declared is the liability to account only for the money had and received. Though in view of the decision in the *State of Madras* v. *Sivasankara Mudaliar*, A.A.O. 108 of 1960, a landholder cannot seek to recover from the State moneys not collected alleging negligence or default against the Government, he would be entitled to call upon the Government to discharge the obligation which it has taken upon itself and to do its statutory duty. The plaintiff may have other remedies to compel the State to do its duty but the State cannot be called upon to account in the suit for the moneys not realised, the liability to account being limited to the moneys actually collected by the Government and not paid over to the landlord after lawful deduction therefrom.

Appeal against the decree of the Court of the Subordinate Judge of Ramanathapuram at Madurai dated 1st February, 1962 in Appeal Suit No. 144 of 1961, preferred against the decree of the Court of the District Munsif of Paramakudi in Original Suit No. 59 of 1959.

The Additional Government Pleader, for Appellant.

V. Vedantachari and *K. Vedantham*, for Respondent.

The Court made the following

ORDER.—This second appeal has been preferred by the State of Madras and arises out of a final decree in a suit for rendition of accounts filed by the respondent Devasthanam. The respondent is stated to be a religious institution entitled to 14 and 3/8th share out of 36 shares in the village of Vadakuchandanoor which has been taken over by the Government under the Estates Abolition Act on 16th March, 1953. The Rent Reduction Act, Madras Act XXX of 1947, had been applied to the village by a notification on 24th February, 1950. On the averment that since the notification of the village under the Rent Reduction Act the State which had been collecting Melwaram from the ryots had not paid over to the plaintiff Devasthanam the amounts payable in terms of Madras Act XXX of 1947 for Faslis 1359 and 1360, the suit came to be filed for rendition of accounts of Melwaram collections. A preliminary decree was passed in the case on 13th February, 1960. No doubt a ground has been taken before me that no decree for accounts ought to have been passed in the case, but the preliminary decree for accounting has become final and it cannot now be challenged. However, it is open to the defendant to plead even now on the merits of their liability to account to the extent it may be done without challenging the preliminary decree. It is unfortunate that despite several opportunities, which the appellants before me had, they have not been able to satisfy the Courts below as regards the stand taken by them with reference to the actual accounting. Several versions as regards the figures were given. But none of them could stand scrutiny and ultimately the decree in favour of the plaintiff is for the land cess which ought to have been collected by the State and which they pleaded they had not collected. The plaintiff claims a sum of Rs. 260-9-0 on the basis of Exhibit A-4 dated 30th November, 1956, a copy of the Board of Revenue proceedings on the demand and collections for Faslis 1359 and 1360 for the village in question. This statement of accounts giving the collections at the reduced rates under section 3 (4) of Madras Act XXX of 1947 and the amount payable to the landholder which was sanctioned, shows the demand for the Faslis as Rs. 571-9-0. The collections are

shown to be Rs. 311-0-0. For collection charges a sum of Rs. 26-14-6 is deducted. A sum of Rs. 263-13-0 is shown as total Government dues for pieshkush, cesses, etc., to be adjusted. A sum of Rs. 10 is sanctioned for payment to the landholder. A direction is given that the Collector should collect the balance quickly. The plaintiff would contend that the balance had been collected and he is entitled to payment of the balance, whereas it is stated for the defendant that the balance was not collected. Their case is that it was wrongly included in the demand and that nothing is payable to the plaintiff. I may at once state that the case for the State that the plaintiff himself never collected cess from ryots, has not been accepted by the Courts below. So the case has to proceed on the assumption that the plaintiff as a landholder could have realised also land cess from the ryots. For the plaintiff it has been rightly pointed that if in fact the ryots had refused to pay the cess for Faslis 1359 and 1360, due intimation would have been sent by the Collector to the Board of Revenue shortly after Exhibit A-4. The absence of any record for the State to show that the ryots were not obliged to pay the cess and so the cess was not collected, goes against the evidence on record.

The second appeal was rested before me on two grounds: (1) that the State was not bound to account for the cess when in fact they have not collected the cess; and (2) that the rent which the State could recover under the Rent Reduction Act would not include cess.

To take up the second contention first, land cess is levied under the Madras Local Boards Act of 1920, now referred to as Madras District Boards Act. Section 78 of the Act provides for the levy of land cess on the annual rent value of all occupied lands on whatever tenure held. Section 79 provides for the assessment of the annual rent value and the relevant part runs thus:

"79. The annual rent value shall, for the purposes of section 78, be calculated in the following manner:—

....

(iii) In the case of lands held on any other tenure, the annual rent payable to the landholder, sub-landholder or any other intermediate landholder holding on an under-tenure created continued or recognized by a landholder or sub-landholder, as the case may be, by his tenants, together with any water rate which may be payable for their irrigation, shall be taken to be the annual rent value."

Section 88 of the Act provides for payment by the landholder of land cess to the Collector. The material portion of the section reads:

"Every landholder and sub-landholder shall pay to the District Collector or other officer empowered by him to receive it, the land-cess due in respect of lands held by him exclusive of the amount of such cess, if any, payable by the sub-landholder or landholder as the case may be and by the tenant, on or before such dates and in such instalments as the district collector under the general orders of the Board of Revenue may, by notification, declare........................

....

Provided also that, in the case of lands occupied by tenants, it shall be lawful for the landholder, sub-landholder or any other intermediate landholder, as the case may be, to recover from his tenant one-half of the amount payable by such landholder, sub-landholder or intermediate landholder in respect of the lands so occupied."

Section 89 is also important. The material portion of the section states:

"Every landholder, sub-landholder or any other intermediate landholder, as the case may be, shall in recovering any amount which may be due to him under the proviso to section 88, be entitled to exercise the same powers as may, under any Act or Regulation which now is, or hereafter may be, in force, be exercised by any landholder in the recovery of rent, and shall be liable to all the penalties prescribed therein for the abuse of such powers." .....

The contention of the plaintiff is that once an estate comes to be held under the Rent Reduction Act, the landholder cannot recover any cess and it is the duty of the State to realise also the cess as part of rent and pay over the same to him. It is contended that the Government alone is entitled to collect the cess from the ryots, and deducting the collection charges they should pay the cess collected to him. The Madras Estates Land Act, 1908 defines " rent " under section 3 (11) thus :

> " 'Rent' means whatever is lawfully payable in money or in kind or in both to a landholder by a ryot for the use or occupation of land for the purpose of agriculture and includes whatever is lawfully payable on account of water supplied by the landholder or taken without his permission for cultivation of land where the charge for water has not been consolidated with the charge for the use or occupation of the land.
>
> For the purposes of sections 5, 27, 28, 59 to 72, 77 to 131, 135, 136, 145 to 148, 165, 210 and 211 and the Schedule, rent includes also—
>
> (*a*) any local tax, cess, fee or a sum lawfully payable to a landholder by a ryot as such in addition to the rent due according to law or usage having the force of law and also money recoverable under any enactment for the time being in force as if it was rent..........".

Relying on these provisions, the Court below has held that cess has to be paid to the landholder by the tenant, that therefore the landholder is entitled to the cess that is liable to be collected and must be collected by the Government and he must be paid irrespective of the fact whether the Government collected the amount or not. In the instant case it is found that the Government have to pay the plaintiff the sum of Rs. 260-9-0 but finding some arithmetical mistake in the calculation, the decree is limited to Rs. 240-62 P. On the face of it there is one mistake in the decision of the Courts below. Under the proviso to section 88 of the Madras District Boards Act the landholder can recover from the tenant only one half of the cess payable by him in respect of the land occupied by the tenant and not the entirety of the cess payable for the land; and it is not clear whether the amount, determined as a cess by the lower Court represents only the tenants' share. Normally the deduction should be presumed to be of the entire cess and if that is so the plaintiff cannot have a decree for his share of the liability also.

In my view the contention on behalf of the State that the land cess cannot be recovered by the State under the provisions of Madras Act XXX of 1947 appears to be untenable. The point in this form was not taken in the Courts below and the only argument that was advanced was that in fact land cess was not payable by the tenants in the village, and that it was not actually collected by the State. Even in the memorandum of second appeal no ground has been taken in this regard, the only ground being that the Courts below erred in holding that the State was liable to pay the plaintiff even when they had not in fact collected any amount towards cess from the ryots and that there was no accountable relationship between the State and the plaintiff in respect of the amount not actually collected by the State. The argument for the State now is that for particular purposes only cess is deemed to be rent under the Estates Land Act and that it is not rent for all purposes. The Rent Reduction Act as such does not define rent, though it is applied to all estates defined under section 3 (11) of the Madras Estates Land Act, 1908. My attention is drawn to section 3 (4) of Act XXX of 1947 which reads :

> "After such an order (an order under section 3 (2) fixing rent in the village) has taken effect in respect of any estate or portion of an estate, the rents due in respect of ryoti lands in such estate or portion with effect from the commencement of Fasli year 1357 as well as the rents which have fallen or may fall due in respect of such lands for any Fasli subsequent to Fasli 1357 until the commencement of the Fasli year in which the estate may be finally taken over by the State Government and any interest payable on such rents under sub-section (6) shall be recovered by the State Government as if such rents and interest were arrears of land revenue

due to them ; and the amount so recovered in respect of each Fasli, after deducting therefrom the cost of such recovery as determined in accordance with such rules as may be made by the State Government in that behalf, and also the peishkush, cesses, and other moneys due from the landholder to the State Government and constituting a charge on the estate shall be paid to the landholder........"

Section 3 (7) is important and it runs :

" The landholder shall not be entitled to collect, and the provisions of Chapters V and VI of the Madras Estates Land Act, 1908 shall cease to apply to any rents or interest recoverable by the State Government under sub-section (4).".

Learned Counsel for the State contends that there is nothing in these provisions which necessarily require that rent under this Act should be construed so as to include cess also as provided for under section 3 (11) of the Estates Land Act. The matter in my view cannot be disposed of by mere absence of any definition of rent in the Rent Reduction Act. Two things must be borne in mind. Firstly, the Rent Reduction Act is generally a prelude to the taking over of the estate under the Abolition Act (XXVI of 1948). Secondly, once the village is notified under the Rent Reduction Act, even the arrears of rent can be realised only by the State and the landlord is interdicted from collecting any rent from the tenants. The provisions of Chapters V and VI of the Madras Estates Land Act which deal with the payment of arrears of rent and the recovery of rent by suit or by distraint and sale of movable property or of the holding, cease to apply to any rent recoverable by the State Government under the Rent Reduction Act. Now cess is included in the definition of rent in the Estates Land Act *inter alia* for making it first charge upon the holding and in the provisions relating to the recovery of arrears of rent found in Chapter V and VI of the Estates Land Act. Section 89 of the Madras District Boards Act empowers the landholder in the recovery for cess to exercise the powers as he may be given under any Act for the recovery of rents due to him. That is the Estates Land Act would include cess in the definition of rent for the purpose of giving a charge to the landholder for the same and also for the purpose of recovering it. While the Rent Reduction Act does not define rent, it takes away from the landholder the power of recovering rent. On the abolition of an estate the Government is entitled to take possession with the estate of all accounts, registers, Muchalikas, etc., relating to the estate which the Government may require for administration thereof. If, in such circumstances, the landholder is to be left to his own resources to recover the cess, the practical difficulties and inconvenience will be insurmountable. It is a rule of interpretation to presume the intention which appears to be most in accord with convenience, reason, justice and legal principles, particularly when there is doubt as to the true one. There are provisions in the Rent Reduction Act which make it plain that where the context so require even as in the Estates Land Act the rent would include cess. Section 3 (4) of the Rent Reduction Act provides for deducting from the arrears of rent realised by the Government besides the cost of the recovery as prescribed, peishkush, cesses and other moneys due from the landholder to the State Government and constituting a charge on the estate. The Rent Reduction Act does away with the landholder's power of realisation of rent from the estate, the State taking upon itself the realisation of rents from the tenants and the Abolition Act, when it comes into effect, does away with intermediaries. Can it be said in the circumstances that the landholder can proceed against the tenants for the recovery of cess due which has been treated as part of rent for the purpose of recovery under the Estates Land Act ? The landholder is entitled to recover from the tenants half the cess due on the land, and the Government from the total recovery, deducts the entirety of the cess due by the landholder. Is the landholder to file suits for the recovery of arrears of cess, after the estate has been taken away from him ? Even his account books vest in the Government on the abolition. It stands to reason that the Act contemplates that the State itself shall collect the cess also due from the tenants as rent. There is a faint suggestion that there can be no reduction in cess if it is treated as rent. But if the rents are reduced, cesses where proportionate to the rents proper payable, they also automatically get reduced. I may

also refer to the fact that under the Abolition Act all expressions in the Estates Land Act shall have the same respective meaning as in that Act with modifications, if any, found in the Abolition Act. Section 55 of that Act provides for the collection of arrears of rent for the Faslis now in question which accrued before the notified date and payment of the same to the landholder after deduction *inter alia* of the arrears of peishkush, quit rent, jodi and other amounts, if any of a like nature due from the landholder to the Government.

I shall take up the next contention that as the State has not realised the cess, it is not bound to account for any portion of it to the landholder. In the *State of Madras* v. *Sivasankara Mudaliar*[1], Ganapatia Pillai, J., observed :

"All the same, the duty imposed upon the State Government by the Rent Reduction Act of collecting the rent due to the landholder in which till the estate was notified under the Abolition Act the State had no beneficial interest, carries with it the liability to account for money had and received. In order to effectuate this remedy which is available to the landholder it would be necessary for him to be informed of the amount actually collected by the State, and, for this purpose, he can call for an account. To this limited extent alone the State exposes itself to the liability of rendering account to the landholder whose estate was notified under the Rent Reduction Act. In my opinion, beyond this, no further liability was cast upon the State by reason of its undertaking the duties imposed upon it by the Rent Reduction Act".

The learned Judge refers to the decision in *Rajah of Bobbili* v. *State of Madras*[2], where it has been observed that the Government is, as it were, a statutory agent of the landholder for collection, and proceeds—

"He did not equate the position of the State under the Rent Reduction Act to that of an agent under the common law. To the extent to which the State collected the money belonging to the landholder the State is exposed, as already observed by me, to the liability of rendering an account for the money had and received. Beyond this I am unable to hold that this decision is an authority for contending that any other duty which an agent has to perform like handing over papers and account books, to vouch for items in the accounts, to be liable for neglect of duty, or to take directions from the principal in the matter of performance of duty, would attach to the Government merely because it is described as a statutory agent.".

The liability of the State that is declared is the liability to account only for money had and received. In the present case the cesses have not been colledcted by the State from the tenants. But the State has deducted the cesses due on the lands from the rent proper realised from the tenants. It is pointed out for the State that this is perfectly in order, as the primary liability for the cesses is that of the landholder and he becomes entitled to recover cesses only when the cesses have been paid by him to the State. My attention is drawn to the decision of this Court in *Muthuramalinga Sethupathi* v. *Mahalinga Raju*[3], where it has been held that the liability of the tenant is that imposed by the proviso to section 73 of the Local Boards Act, 1884, corresponding to the present District Boards Act, and that the tenant is liable to the landlord only in respect of the portion of cess which the latter has actually paid and contingently on his having made the payment. It is no doubt the duty of the State to collect the cess due to the landholder as rent and pay such collections to the landholder less the prescribed deductions. It is pointed out for the State that the arrears are recoverable by the State as arrears of land revenue and that so far as the State is concerned there is no question of any bar of limitation. While in the light of the ruling of Ganapatia Pillai, J., in the *State of Madras* v. *Sivasankara Mudaliar*[1], referred to a landholder cannot seek to recover from the State moneys not collected alleging negligence or default against the Government, he would in my view be entitled to

1. A.A.O. 108 of 1960.
2. (1952) 1 M.L.J. 174.
3. (1919) 9 L.W. 287.

call upon the Government to discharge the obligation which it has taken upon itself and to do its statutory duty. In Maxwell's Interpretation of Statutes, 11th Edition, at page 235 it is stated :

> "The Supreme Court of the United States similarly laid it down that that which public officers are empowered to do for a third person the law requires shall be done whenever the public interest or individual rights call for the exercise of the power, since the latter is given, not for their benefit, but for his, and is placed with the depository to meet the demands of right and to prevent the failure of justice".

The Board of Revenue had in Exhibit A-4 directed the Collector to realise the balance quickly and that was in the year 1956. The position now is that the plaintiff may have other remedies to compel the State to do its duty but the State cannot be called upon to account in the suit for the moneys not realised, the liability to account being limited to the moneys actually collected by the Government and not paid over to the landlord after lawful deductions therefrom. It is suggested for the plaintiff that it is a religious institution and special provisions are made for religious institutions, the State being under an obligation to make good the loss by enforcement of the Rent Reduction Act. That question is not germane to the claim in the manner now put forward. To the extent the moneys have been collected they are accounted for duly as found in Exhibit A-4. Looking from this angle, it is immaterial as to the nature or character of the collections and as to how the balance of demand shown in Exhibit A-4 still to be collected is made up of. The moneys realised having been accounted for the suit has to fail.

In the result the second appeal is allowed. Having regard to the fact that there has been considerable confusion in the Courts below as to the nature of the liability and in view of the fact that the State has not been able to make out its contention that the demand as in Exhibit A-4 is erroneous and the demand must have been only for Rs. 263-13-0 this is not a case for ordering costs. The suit O.S.No. 59 of 1959 is dismissed. The parties will bear their respective costs throughout. No. leave.

S.V.J. *Second appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. CHANDRA REDDY, *Chief Justice* AND MR. JUSTICE M. NATESAN

G. Ramasundaram and others .. *Petitioners**

v.

The Inspector of Panchayats (District Collector), South Arcot and others .. *Respondents.*

The Madras Panchayat Act (XXV of 1958) and the Conduct of Election of Members of the Village Panchayat Rules, 1964—Rules 11 and 13—Validity of Rules—Whether rules void on ground of excessive delegation of essential legislative functions to executive—Reference to prior legislations—When can be made.

There is ample indication in the Act itself that what is contemplated for the Panchayats is direct election. Section 20 provides for the preparation of the electoral roll for the Panchayat and every person whose name appears in the electoral roll of the Panchayat is entitled to vote at an election to the Panchayat. If there is to be an intermediate body and the election is to be indirect, it cannot be said that every person whose name is found in the electoral roll is voting for the election of a Panchayat member. The electoral roll in such a case would contain only primary votes and not voters for election at the Panchayat. But the electoral roll that is prepared under section 20 is the electoral roll for the Panchayat as is clear from section 20 itself.

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*W.P. Nos. 396, 596, 600, 608, 922 and 958 of 1965. 3rd December, 1965.

No doubt the Act does not specifically say that the voting will be secret. But one cannot overlook that vote by ballot (or some form of secret voting) is now the universal practice. A reference to section 24 of the Panchayat Act itself shows that the Act recognises secrecy of election. Rule 11 of the Conduct of Election of Members of the Village Panchayat Rules, 1964, *inter alia* ensures that the voting shall be secret and rule 13 also seeks to assure secrecy of voting. But where secret ballot is universally accepted, and direct election is the rule rather than the exception, no specific direction in that regard would be necessary. No policy decisions requiring guidance of the Legislature are left to the executive under the impugned rules 11 and 13.

When any rule is attacked on the ground that the delegation is unconstitutional, what has to be looked for is whether the administrative authority has been supplied with proper guidance in the matter; is there any abdication by the Legislature of its functions leaving it to the executive to frame the rules on its own unguided initiative, with no guide lines indicating the policy or principles. The legislative policy is apparent on the face of the enactment itself. It contains indications as to the manner and method of carrying out election and that the election must be direct and voting must be by secret ballot.

Apart from the legislative practice that has been shown of leaving the manner and method of election to the rules, the normal manner and method of election to self-governing units in the democratic set up is practically well settled. The election of the Madras Panchayats Act, 1950 as well as the rules for election to local bodies have been there. If there is to be no departure from the method of holding elections and getting elected representatives till then followed, the rule making authority has the established cannons of election procedure for guidance. There is no unchartered sea for its to plough it way. Where there is in existence a policy regarding the manner and mode of elections to local bodies, the underlying policy of the new enactment providing for similar elections must be held to be apparent. To find out whether executive had a policy or guidance in that matter, reference may be made to prior legislations. The Election Rules made under the Panchayat Act, 1950, and published in the gazette had effect as if enacted in the Act. The relevant sections of the present Act and rules are more or less identical with the corresponding sections and rules of 1950 Act. There being available guidance and established practice, it cannot be said that, by providing for rules to be made by the executive, the Legislature has abdicated its function. No change in the traditional or conventional policy is contemplated in the Act. A policy may be particularised in as few or as many words as the Legislature thinks proper and it is enough if an intelligent guidance could be found in the enactment by the subordinate authorities, having regard to the prior law on the same subject.

Held, that there has been no such excessive delegation as would require the rules to be struck down.

Petitions under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* restraining the respondents therein from holding the elections pursuant to the notification under section 16 of the Act for Ponpathi Panchayat, Gingee Taluk and to issue writs of *certiorari* calling for the records relating to the declaration by the first respondent of the results of the elections to Hanumanthanpatti Panchayat, Ramaswaminaickenpatti Panchayat, Kotapundi Panchayat, Vannivelampatti Panchayat and S. Arasapatti Panchayat respectively, dated 2nd February, 1965, and 28th January, 1965 respectively and quash the same.

V. Manivannan and *K. K. Venugopal*, for Petitioners.

The Advocate-General (*N. Krishnaswami Reddi*), for Additional Government Pleader, (*V. Ramaswami*), *S. Rajagopalan*, *K. Narayanaswamy Mudaliar*, *N. Arunachalam*, *T. Chengalvaroyan* and *S. K. Ahmed Meeran*, for Respondents.

The Judgment of the Court was delivered by

Natesan, J.—These petitions under Article 226 of the Constitution raise a common question, the validity of the rules relating to the manner and method of election of members to the village panchayats under the Madras Panchayats Act, 1958, the contention being that the rules are void for the reasons that there has been excessive delegation of essential legislative functions to the Executive. The facts in Writ Petition, No. 596 of 1965, typical of the petitions may be briefly set out. This relates to Hanumanthapatti village panchayat in Periakulam Taluk, Madurai district. There had been an election to the Panchayat under the Madras Act XXV of 1958 (hereinafter referred to as the Act) in 1959. The election which has given raise to the present petition was held on 2nd February, 1965, and under the provisions of the Act the election authority declared respondents 4 to 16 in the writ petition as duly elected members of the panchayat. The petition has been preferred by a voter of the panchayat, questioning the declaration of the election of respondents 4 to 16 as the duly elected members of the panchayat *inter alia* on the ground that the Act itself has made no provisions for the elaborate procedure required for holding elections, and for deciding election disputes. It is contended that the manner and method of election of members of a panchayat should be provided only by the Legislature and its delegation without laying down any policy or standard for guidance is unconstitutional. As the panchayat under the Act has been given vast powers in local administration, including powers to raise finance by taxation, it is submitted that the panchayat which has not been validly constituted should not be permitted to function. We have had some interesting arguments from Mr. K.K. Venugopal, learned Counsel for the petitioner, as to the various featurs of an election, the several methods by which representatives could be chosen and the wide variation in the methods, differing from each other not merely on details but also in matters of policy and principles. It was submitted that the methods of election and the choosing of representatives will have to vary according to the composition of the electorate, the position and powers of the representatives and the stage to which the electorate as advanced in the matter of its civic and political consciousness. It is unnecessary to detail them, as ultimately to a question from us as to which of the provisions of the rules are sought to be invalidated learned Counsel stated that rules 11 and 13 of the rules entitled : *The Conduct of Election of Members of the Village Panchayats Rules*, 1964, have to be struck down. The learned Advocate-General appearing on behalf of the State submitted that there was no excessive delegation of legislative powers in this case and that the rules have been validly and legally made and only carried out the policy and guidance provided by the Act itself.

The present Panchayat Act, Madras Act, XXXV of 1958 comes in substitution of the Madras Village Panchayat Act of 1950 (Madras Act X of 1950). Article 40 of the Directive Principles of State Policy in the Constitution provides for the State taking steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-Government. The legislative power is found under item 5 of List II of the Seventh Schedule :

> Local Government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-Government or village administration.

Section 8 of the Panchayat Act provides for the constitution of panchayats for villages and towns and their incorporation. Section 10 provides for the strength of a panchayat, the total number of members of a panchayat to be notified by the Inspector in accordance with such scale as may be prescribed with reference to population. Section 14 runs thus :

> The members of the panchayat shall be elected in such manner as may be prescribed :

Provided that no person shall be eligible to be elected or co-opted under this Act as a member of more than one panchayat.

Section 16 provides for division of the panchayat into wards for the purpose of electing members to the panchayat. Section 17 relates to the term of office of the members and provides for the filling up of ordinary and casual vacancies which are defined under section 2 of the Act. Section 20 provides for preparation and publication of electoral roll and qualification for inclusion therein. It is necessary to set out some of the parts of section 20 material for our present purpose :

(1) Every person whose name is included in such part of the electoral roll for any Assembly Constituency as relates to the village or town or any portion of the said village or town shall be entitled to be included in the electoral roll for the panchayat and no other person shall be entitled to be included therein.

Explanation........................

(2) As soon as may be after the electoral rolls for the Assembly Constituencies which consist of, or comprise, the village or town or any portion of the said village or town have been published, revised or amended in pursuance of the Representation of the People Act (XLIII of 1950) any person authorised by the prescribed authority in this behalf shall publish in such manner as the Government may direct, the portions of the said rolls which relate to the village or town or of the alterations therein as the electoral roll for the panchayat or as alteration to such roll as the case may be.

(3) The electoral roll for the panchayat shall be divided into separate parts for each ward.

(4) ....

(5) Every person whose name appears in the electoral roll for the panchayat shall, so long as it remains in force and subject to any revision thereof which might have taken place and subject also to the other provisions of this Act be entitled to vote at an election; and no person whose name does not appear in such roll shall vote at an election.

Explanation...................

Section 21 provides for the correction of electoral roll of the panchayat by the prescribed authority, after making enquiry and publishing amendments to the electoral roll for the purpose of bringing it into accord with the electoral roll for the relevant Assembly Constituency. Section 22 relates to qualifications of candidates and enacts that no person shall be qualified for election as a member of a panchayat unless his name appears on the electoral roll of the panchayat. Section 24 deals with disqualifications from voting or being elected in election. It runs thus:

Every person convicted an offence punishable under Chapter IX-A of the Indian Penal Code (XLV of 1860) or under any law or rule relating to the infringement of the secrecy of an election shall be disqualified from voting or from being elected in any election to which this Act applies or from holding the office of member of a panchayat or of a panchayat union council for a period of five years from the date of his conviction.

Section 25 deals with disqualifications of candidates and section 26 with disqualifications of members. Section 178 which empowers the Government to make rules generally to carry out purpose of the Act provides by sub-section (2) (*ii*) that in particular, and without prejudice to the generality of the power the Government may make rules as to all matters relating to electoral rolls or elections, not expressly provided for in this Act, including deposits to be made by candidates standing for election and the conditions under which such deposits may be forfeited and the conduct of inquiries and the decision of disputes relating to electoral rolls or elections.

In the rules framed under the power conferred as above stated detailed provisions have been made in regard to the manner and method of holding election, the appointment of the Returning Officer, the duties of the Returning Officer, the appointment of Presiding Officers, the duties of the Presiding Officers, presentation of nominations and procedure to be followed in contested and uncontested elections. Rule 11 provides for arrangements at polling stations. Rule 12 deals with ballot papers and rule 13 with the issue of ballot papers and voting procedure. Provision is made for recording of votes of blind and infirm electors. Rules are made with reference to spoilt and returned ballot papers, closing of poll and counting of poll, declaration of the results of election, etc. It may be stated that it is not contended that the rules, if otherwise valid, are not exhaustive and did not provide an adequate and efficient machinery for election of the members of a Panchayat. Rules have also been framed for the decision of election disputes. Sub-rule (3) of rule 1 specifically provides that the election of members shall be by secret ballot.

The attack of Mr. K. K. Venugopal on the validity of the rules may be summarised thus. An election consists of seven stages : (1) prescribing qualifications for a votor; (ii) delimitation of wards or constituencies; (iii) preparation of electoral rolls; (iv) qualifications and disqualifications of candidates; (v) manner or method of election; (vi) machinery for the conduct of election; and (vii) machinery for the disposal of election disputes. There is no dispute that the first four stages are adequately and clearly provided for in the Act itself. The lacuna in the Act comes in, according to learned Counsel, with reference to the manner and method of election, section 14 simply stating that the members of the panchayat shall be elected in the manner to be prescribed. The argument is elaborated as follows; an election it is submitted could be direct or indirect and expression of the choice of his candidate by an elector may be either by public voting or bv secret voting. Representation to an elective body could be by proportionate representation, by single non-transferable vote, by limited vote and so on. It is submitted that by section 178 of the Act, it is left to the Executive to decide whether the voting is to be by public or by secret ballot, whether the election is to be direct or indirect and whether the representation is to be by single non-transferable vote or by proportionate representation or by other process. These are matters, it is submitted, which could not be left to the Executive having to be the subject of policy decisions. But as found in the text-book, *the Substance of Politics by* Appadorai referred to by learned Counsel, only Senates of France and South Africa are indirectly elected bodies. All others are directly elected. Indirect election involves an intermediate electorate body between the primary voters and the selected representatives. The primary voters select the intermediate voters who form the electoral college and this electoral college chooses the elected representatives. There may be a policy in the matter of deciding which system of election is to be adopted for any particular elective body. It is needless for us here to discuss the merits of indirect and direct elections. In our view, there is ample indication in the Act itself that what is contemplated for the panchayats is direct election. Section 20 provides for the preparation of electoral roll for the Panchayat and every person whose name appears in the electoral roll of the panchayat is entitled to vote at an election to the panchayat. If there is to be an intermediate body and the election is to be indirect, it cannot be said that every person whose name is found in the electoral roll is voting for the election of a panchayat member. The electoral roll in such a case would contain only primary voters and not voters at election for the panchayat. But the electoral roll that is prepared under section 20 is the electoral roll for the panchayat as is clear from section 20 itself.

The next point made by learned Counsel as involving a question of policy is as to the method of voting—secret voting or public voting. It is stated that, though the Act refers to voting at an election, there is no indication in the Act that it should be by secret ballot. This has been left to the Executive to decide. No doubt the Act does not specifically say that the voting will be secret. But one

cannot overlook that, as noticed in *The Substance of Politics* by Appadorai, vote by ballot (or some form of secret voting) is now the universal practice. It is found in that text-book at page 465 that though the case for public voting is in theory unassailable, public voting has disappeared in modern States, because its working revealed a serious practical defect and the possibility of coercion of the voter. That apart, a reference to section 24 of the Panchayat Act itself shows that the Act recognises secrecy of election. Under section 24 every person convicted of an offence punishable under any law or rule relating to the infringement of secrecy of an election get disqualified from voting or from being elected in any election under the Panchayat Act or from holding the office of member of a Panchayat. The various theories of adequate representation, proportional representation achieved by single transferable vote or by list system, cumulative vote are all special modes of representation, and it is not the case of the petitioners that any such special modes have been provided for under the rules. As stated at the outset, the attack on the rules was confined to rules 11 and 13, evidently on the basis that these ensured direct election and secret voting. Rule 11 deals with arrangements at a polling station. It *inter alia* ensures that the voting shall be secret and clause (1) of the rules reads :

> "There shall be a polling station for each ward. Each polling station shall contain one or more voting compartments in which electors can record their votes screened from observation."

The other provisions of the rule relate to the Returning Officer providing at each polling station, the necessary number of ballot boxes, copies of electoral rolls etc. Provision is made that the ballot box shall be so constructed that ballot papers can be introduced therein but cannot be withdrawn therefrom, without the box being unlocked. There are other details for the proper conduct of election. Rule 13 provides for the issue of ballot papers, identification of the voter and the voting procedure. Each voter is to be given only one ballot paper. The method in which ballot paper is to be marked is set out. This rule also seeks to assure secrecy of voting, But when secret ballot is universally accepted, and direct election is the rule rather than the exception, no specific direction in that regard would be necessary. We are unable to see any policy dicisions requiring guidance of the Legislature, being left to the Executive under the impunged rules 11 and 13.

Learned Counsel refers to provisions of the Respresentation of People Acts (XLIII of 1950 and XLIII of 1951), and points out that these Acts specifically provided not only for the secrecy of ballot but also for representatives to be chosen by direct election. Section 7 of Act XLIII of 1950 is referred to, which shows that the members of the Legislative Assembly are to be chosen by direct election. Article 81 of the Constitution is also referred to where reference is made to direct election by voters of States to the House of People. But as regards secrecy of election, section 59 of Act XLIII of 1951 only states that at every election where a poll is taken votes shall be given by ballot in such manner as may be prescribed and no votes shall be received by proxy. Section 94 provides under the heading *Secrecy of voting not to be infringed* that no witness or other person shall be required to state for whom he has voted at an election. Under the heading *Maintenance of Secrecy of Voting* section 128 also provides that every officer, clerk, agent or other person who performs any duty in connection with the recording or counting votes at an election shall maintain, and aid in maintaining the secrecy of voting and shall not (except for some purpose authorised by or under any law) communicate to any person any information calculated to violate such secrecy. Secrecy of ballot is taken as axiomatic and as pointed out in the *Substance of Politics* by Appadorai, it is of universal practice. It is no doubt true that with reference to Parliamentary elections and elections to State Legislatures the Acts themselves are elaborate. But that is obviously because of the importance and magnitude of the task. Elections to Parliament and to the Legislatures of States are specifically listed under item 72 of List I of the Seventh Schedule of the Constitution.

When any rule is attacked on the ground that the delegation is unconstitutional, what has to be looked for is whether the administrative authority has been supplied

with proper guidance in the matter; is there an abdication by the Legislature of its function leaving it to the Executive to frame the rules on its own unguided initiative, with no guidelines indicating the policy or principles? The tests are summed up as follows by Fazl Ali, J., on the Presidential Reference, *In re, The Delhi Laws Act, 1912, etc.*[1]:

> (1) The legislature must normally discharge its primary legislative function itself and not through others.
>
> (2) Once it is established that it has sovereign powers within a certain sphere, it must follow as a corollary that it is free to legislate within that sphere in any way which appears to it to be the best way to give effect to its intention and policy in making a particular law, and that it may utlise any outside agency to any extent it finds necessary for doing things which it is unable to do itself or finds it inconvenient to do. In other words, it can do everything which is ancillary to and necessary for the full and effective exercise of its power of legislation.
>
> (3) It cannot abdicate its legislative functions, and therefore while entrusting power to an outside agency, it must see that such agency acts as a subordinate authority and does not become a parallel Legislature.
>
> (4) The doctrine of separation of powers and the judicial interpretation it has received in America ever since the American Constitution was framed, enables the American Courts to check undue and excessive delegation but the Courts of this country are not committed to that doctrine and cannot apply it in the same way as it has been applied in America. Therefore, there are only two main checks in this country on the power of the Legislature to delegate, these being its good sense and the principle that it should not cross the line beyond which delegation amounts to "abdication and self-effacement."

In our opinion, the rules which are challenged in the present case as unconstitutional on the ground of their being the product of excessive delegation of legislative power would fall within the second of the above prepositions. Dealing with delegated legislation, Mukherjea, J. (as he then was) observed on the same reference, at page 981:

> "As said already, it is within powers of Parliament or any competent legislative body when legislating within its legislative field, to confer subordinate administrative and legislative powers upon some other authority. The question is: What are the limits within which such conferment or bestowing of powers could be properly made?..............................
>
> If the Legislature hands over its essential legislative powers to an outside authority, that would, in my opinion, amount to a virtual abdication of its powers and such an act would be in excess of the limits of permissible delegation.
>
> The essential legislative function consists in the determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct. It is open to the Legislature to formulate the policy as broadly and with as little or as much details as it thinks proper and it may delegate the rest of the legislative work to a subordinate authority who will work out the details within the framework of that policy."

Judged in the light of the above principles, can it be said in this case that there is no legislative policy or criterion for the administrative authority to follow up in framing the rules? Is it a case where what has been left out for the subordinate body to carry on is the determination of the legislative policy itself? Learned Counsel for the petitioner contends that there are no proper criteria or standards indicated in the Act and uncanalised power has been surrendered to the Executive to determine the manner and mode of election. We do not think that this is a

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1. (1951) S.C.R. 747, 830 : (1951) S.C.J. 527.

correct view to take of the position. In our view, the legislative policy is apparent on the face of the enactment itself. We have already discussed when examining the provisions of the Act that it contains indications as to the manner and method of carrying out election, that the election must be direct and voting must be by secret ballot, the two policy matters stressed by learned Counsel.

Further, it is not as if for the first time the Panchayat Act has been enacted and and elections to panchayats provided for. The present Act, Madras Act XXXV of 1958, is no doubt wider in scope and envisages a comprehensive programme of measures designed to promote rural employment to improve rural living conditions, national extension service, scheme of community development, etc. It provides for the formation of union of panchayats and constituting panchayat union councils. But so far as the village panchayats are concerned, the present Act replaces the earlier Madras Village Panchayat Act (X of 1950). In the former Act may be seen provisions corresponding to the provisions of the present Act in relation to the constitution of panchayats, strength of panchayats, election of members, division of panchayats into wards and preparation and publication of electoral roll and qualifications for inclusion therein. Under the transitional provisions set out in Schedule IV of the present Act, members of the Panchayat holding office under the old Act are to be deemed to be the elected members of the panchayats under the new Act. Corresponding to the present section 178, rule-making power was given under section 112 in the Act of 1950 and was worded similarly. Pursuant to the said rule-making power, rules almost identical with the present rules for the conduct of elections and enquiry into election disputes were framed. In *Velayutha Mudaliar* v. *D. M. of Vridhachalam*[1]. the validity of the rules for the decision of election disputes under the rule-making power of the Panchayat Act of 1950 was challenged as unconstitutional on the ground of excessive delegation. *Rajagopala Ayyangar, J.* after examining the legislative practice in this regard in this country, observed thus at page 205:

> "There is thus a body of legislative practice, which is sufficient to sustain the validity of this rule-making power. The juridical basis upon which legislative practice is relied upon to sustain the validity of a law is that the content of legislative power granted by the Constitution should be measured by the manner in which the same has been utilised before the Constitution. In other words, the entry in the legislative list conferring upon the Legislature a power in relation to a subject would include, in the light of the legislative practice, a right to legislate in the manner in which it was hithertofore done."

The learned Judge upheld the validity of the delegation and the constitutionality of the rules. We have been supplied with a list of local Acts, and Rules relating to Local Bodies in several States showing that the power conferred on the Government is one which has been traditionally exercised by the Executive and is considered to be of subsidiary nature. The Madras Local Boards Act of 1920 under which an elected District Board was constituted left the manner and method of elections to rules to be framed under the Act. Similarly the Madras City Municipal Corporation Act, 1919 enabled by section 59 the Government to make rules regulating the procedure with regard to elections and provide for all matters not expressly provided in the Act relating to elections of the Mayor, the Deputy Mayor, Councillors or Aldermen, including deposits to be made by candidates standing for election as Councillors, and the conditions, under which such deposit may be forfeited. The Bombay Municipal Corporation Act, 1888 enabled the Corporation to make Rules for the conduct of elections and providing *inter alia* for the manner in which votes are to be given. The Bombay Local Boards Act of 1923 by section 133, enabled the State Government by notification in the Official Gazette from time to time to make rules consistent with the Act determining the mode in which and the places at which and the authorities, if any, under whose supervision elections of members

1. (1955) 1 M.L.J. 201.

of the Local Boards shall be held and the manner in which votes thereat shall be recorded and how and by whom the results of such elections shall be declared. The Bombay Village Panchayats Act, 1933, enabled the State Government under section 108, by notification in the Official Gazette to make Rules prescribing the manner in which the election of members shall be held. The Bengal Municipal Act, 1844, enabled the local Government with respect to each Municipality to lay down such rules not inconsistent with the Act as it shall think fit *inter alia* for the qualifications required to entitle any person to vote for a candidate for election and in respect of the mode of election and the authority who shall decide disputes thereunder. Section 63-A of the Government of India Act, 1919 provides that the Council of State shall consist of not more than sixty members nominated or elected in accordance with rules made under the Act, of whom not more than twenty shall be official members. Section 63-B provided that Legislative Assembly shall consist of members nominated or elected in accordance with the rules made under the Act. Section 72-A of the Act, by sub-section (4) (*c*), contains provision for making rules under the Act as to the qualification of electors, the constitution of constituencies and the method of election for Governor'slegislative councils including the number of members to be elected by communal and other electorates and any matters incidental or ancillary thereto and sub-section (4) (*e*) provides for rules being made for the final decision of doubts or disputes as to the validity of any election. Under the Government of India Act, 1935, section 61 provided that the composition of the Chamber or Chambers of the Legislature of a province shall be such as is specified in relation to that province in the Fifth Schedule to the Act. Rule 20 (*iii*) of Schedule 5 of the Act provided *inter alia* for the Governor-General to make rules with respect to the conduct of elections including the application to elections of the principle of proportional representation by means of the single transferable vote, and rules to regulate election, where certain of the seats to be filled are reserved for members of the scheduled classes, or in the case of Bombay for Marathas, or where certain of the seats allotted to any community must be held by a woman or by a specified type of landholder. Sub-rule (*vi*) of rule 20 provided also for framing rules for the decision of doubts and disputes arising out of or in connection with elections. With reference to rule 20 (iii) it must be noticed that there is specific reference to consideration of the principle of proportional representation.

In *In re The Delhi Laws Act, 1912, etc.*[1], Mahajan, J. (as he then was), while considering the argument that legislative practice in India since a long time had been such as would validate statutes designed on the model of the three statutes under reference to the Supreme Court, quotes with approval the following passage from *U. S.* v. *Curliss Wright*[2]:—

> "Uniform, long continued and undisputed legislative practice resting on an admissible view of the constitution goes a long way to the direction of proving the presence of unassailable grounds for the constitutionality of the practice."

However, the learned Judge held that there was no evidence in that particular case of uniform,long continued and undisputed legislative practice for validating statutes which has been drafted on lines similar to the statutes in question.

In our opinion, apart from the legislative practice that has been shown of leaving the manner and method of election to the rules, the normal manner and method of election for self-governing units in the democratic set-up is practically well-settled. The election Rules of the Madras Panchayat Act of 1950 as well as the rules for election to local bodies have been there. If there is to be no departure from the method of holding elections and getting elected representatives till then followed, the rule-making authority has the established canons of election procedure for guidance. There is no unchartered sea for it to plough its way. Here we would like to draw attention to rule 20 (*iii*) of Schedule 5 to Government of India Act where a special provision was found necessary for the application to election

1. (1951) S.C.R. 747, 950: (1951) S.C.J. 527. 2. 199 U.S. 304.

of the principle of proportional representation by means of the single transferable vote. When there is in existence a policy regarding the manner and mode of elections to local bodies, the underlying policy of the new enactment providing for similar elections must be held to be apparent. In *Bhatnagars & Co. Ltd.* v. *The Union of India*[1], Gajendragadkar, J., (as he then was) while examining the question whether guidance was afforded to the delegate in bringing into operation the material provisions of the Act by laying down principles in that behalf observed at page 718 :

"Turning to the impugned sections of the present Act, it is necessary to remember that the present Act purports to continue for a limited period powers to prohibit or control imports and exports which had already been enacted by the Defence of India Act and the Rules framed thereunder. In other words, this Act does not purport to enact the material provisions for the first time but it purports to continue the previously existing provisions in that behalf and so it would be legitimate so consider the preamble of the predecessor Act and relevant provisions in it to find out whether the Legislature has laid down clearly the policy underlying that Act and has enunciated principles for the guidance of those to whom authority to implement the Act has been delegated.........."

"Incidentally we may also observe that in *Pannalal Binjraj* v. *The Union of India*[2] where the vires of section 5 (7-A) of the Income Tax Act were put in issue before this Court, the challenge was repelled and during the course of the judgment delivered on 21st December, 1956, the previous history of the earlier Income Tax Act was taken into account to decide what policy could be said to underlie the provisions of the impugned section."

We refer to this passage, that to find out whether the Executive had a policy or guidance in that matter, reference may be made to prior legislations. The Election Rules made under the Panchayat Act, 1950, and published in the Gazette had effect as if enacted in the Act. As already stated the relevant sections of the present Act and rules are more or less identical with the corresponding sections and Rules of 1950 Act. There being available guidance and established practice, it cannot be said that by providing for rules to be made by the Executive the Legislature has abdicated its function. No change in the traditional or conventional policy is contemplated in the Act. A policy may be particularised in as few or as many words as the Legislature thinks proper and it is enough if an intelligent guidance could be found in the enactment by the subordinate authorities, having regard to the prior law on the same subject. As observed by Mukherjea, J., (as he then was) in *In re The Delhi Laws Act*, 1912 *etc.*[3]:

"The Court can interfere if no policy is discernible at all or the delegation is of such an indefinite character as to amount to abdication but as the discretion vests with the Legislature in determining whether there is necessity for delegation or not the exercise of such discretion is not to be disturbed by the Court except in clear cases of abuse."

The Act also contains a provision for laying of rules before the Legislature. Section 199 of Act XXXV of 1958 runs :

"(1) All rules, notifications and orders made or issued under this Act shall be published in the *Fort St. George Gazette* and unless they are expressed to come into force on a particular day, shall come into force on the day on which they are so published.

(2) Every rule, notification or order made or issued under this Act shall, as soon as possible after it is made or issued, be placed on the table of both Houses of the Legislature, and if, before the expiry of the session in which it is so placed or the next session, both Houses agree in making any modification in any such rule, notification or order, or both Houses agree that the rule, notification or order should not be made or issued, the rule, notification or order shall, thereafter have

1. (1957) S.C.R. 701 : (1957) S.C.J. 546.
2. (1957) S.C.R. 233.
3. (1951) S.C.R. 747, 984: (1951) S.C.J. 527.

effect only in such modified form or be of no effect as the case may be, so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule, notification or order." Section inserted by Madras Act XVIII of 1964).

No doubt the procedure for laying provided may not secure that degree of legislative control over the subordinate legislation as may be desired or is available when what is known as the affirmative procedure of laying is followed. The learned Advocate-General drew our attention to the following observations in *D. S. Garewal* v. *State of Punjab*[1].

"At the same time Parliament took care to see that these rules were laid on the table of Parliament for fourteen days before they were to come into force and they were subject to modification whether by way of repeal or amendment on a motion made by Parliament during the session in which they are so laid . This makes it perfectly clear that Parliament has in no way abdicated its authority, but is keeping strict vigilance and control over its delegate."

In In re, *The Delhi Laws Act*, 1912, *etc.*[2], Fazl Ali, J., observed:

"It may also be stated that in England delegated legislation often requires the regulations or provisions made by the delegate authority to be laid before the Parliament either in draft form or with the condition that they are not to operate till approved by Parliament or with no further direction. The Acts before us are certainly open to the comment that this valuable safeguard has not been observed, but it seems to me that however desirable the adoption of this safeguard and other safeguards which have been suggested from time to time may be, the validity of the Acts which has to be determined on purely legal considerations, cannot be affected by their absence."

Mr. K. K. Venugopal pointed out that the laying procedure provided in this case cannot be quite effective, as the rules made come into effect on the publication in the Gazette. But in our view it is unnecessary to rely upon or to consider the effect of the laying down provision in the matter of the constitutionality of the delegation of the power to make rules. We are satisfied that in the circumstances of this case there has been no such excessive delegation as would require the rules to be struck down.

In the result the rules *nisi* in the several petitions stand discharged. The petitions fail and are dismissed with costs.

Writ Petition No. 922 *of* 1965.—In this writ petition, besides seeking the invalidity of the election on the ground that there has been excessive delegation of power to the executive for framing of election rules, a further point is taken. The petitioner is a candidate for membership in the Vannivalampatti Panchayat in the election held on 28th January, 1965. His case is that at the election a number of persons whose names were not found in the electoral rolls which had been published, were permitted to vote by the Presiding Officer in spite of his protest being met by the plea that a supplemental list of eligible voters had been prepared and published. The petitioner's case is that he saw such a list of supplemental voters put up on the notice board of the panchayat board only on 29th January, 1965. One of the successful candidates at the election, the 6th respondent in the writ ptetition, has in his counter affidavit, categorically denied that the supplemental list was put up only on 29th January, 1965. According to him, it has been published and put up on the notice board of the panchayat on the 26th January, 1965, the last date for filing nominations. Records have since been produced and it is seen therefrom that the supplemental list has been published even on 25th January, 1965. Learned Counsel does not point to us any rule requiring any particular interval between the final publication of electoral rolls and actual election. The electoral rolls that have been adopted at the election has been finalised before the receipt of nomination. We fail

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1. (1959) S.C.J. 399 : (1959) 1 S.C.R. 792: A.I.R. 1959 S.C. 512, 518.

2. (1951) S.C.J. 527 : (1951) S.C.R. 747 850.

to appreciate the tenability of the plea that the petitioner has lost an opportunity canvassing votes himself. Even on the facts this plea is untenable and does not merit consideration. As to the plea of excessive delegation and invalidity of the entire election on that score, we have already considered the matter in the connected Writ Petitions Nos. 396, 596, 600, 608 and 958 of 1965. There has been no such excessive delegation in this case as would invalidate the rules and make void the election.

The rule *nisi* is, therefore, discharged. The writ petition fails and is dismissed with costs.

S.V.J. — *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

P. N. Rangaswamy .. *Petitioner**

v.

The Commissioner, Coimbatore Municipality, Coimbatore and others .. *Respondents.*

Madras District Municipalities Act (V of 1920)—Rules under—Personal Conduct of Officers and Servants of Municipal Councils Rules, rule 14—Scope—If ultra vires *as violating Article 19 (1) (c) of the Constitution of India.*

Constitution of India (1950), Articles 19 (1) (c) and 226—Scope of Article 19 (1) (c)—Writ jurisdiction—Interference with finding of fact.

Rule 14 of the Personal Conduct of Officers and Servants of Municipal Councils Rules (framed under the Madras District Municipalities Act, 1920) deals with an entirely different matter from the freedom to form associations or unions guaranteed in Article 19 (1) (c) of the Constitution. Rule 14 is designed in the interests of discipline and good Government, on the assumption that active participation of Government servants in politics in any of the specific ways mentioned in the rule will not be conducive to discipline or to the efficient conduct of the administration. But Article 19 (1) (c) of the Constitution gives liberty to all citizens, which will include Government servants, to form associations or unions as long as the exercise of that right does not infringe any of the limitations laid down in Article 19 (4). Thus taking part in politics must be viewed as an objectionable conduct on the part of a Government servant and should not be confused with the several freedoms mentioned in Article 19. Rule 14 cannot therefore be struck down as unconstitutional as infringing any of the freedoms guaranteed in Article 19 of the Constitution of India.

Case-law discussed.

A finding on evidence that a municipal servant actively participated or assisted in the activities of a political party cannot be assailed in writ proceedings.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavits filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records connected with the Proceedings No. 3608/354/C9 dated 18th August, 1961 of the Commissioner, Coimbatore Municipality and to quash the said order in W.P. No. 1331 of 1964 and to issue a writ of *mandamus* directing the 1st respondent to include the petitioner's name in the panel of Headmasters in the manner contemplated under rule 2 of the Rules in W.P.No. 1990 of 1964.

K. V. Sankaran, for Petitioner.

The Government-Pleader and *K. Alagiriswami*, for Respondents.

* W.P. Nos. 1331 and 1990 of 1964. 6th March, 1967.

The Court made the following

ORDER.—These two writ petitions are connected. The petitioner in both of them is one P. N. Rangaswamy who at the time we are concerned with, was employed as a permanent Mathematics Assistant in the service of the Coimbatore Municipality. The terms of his service were governed by the statutory rules issued under the District Municipalities Act. Rule 14 of the Personal Conduct of Officers and Servants of Municipal Councils Rules states:

> "14. *Taking part in politics:*—Subject to any general or special order of the Government, no officer or servant of a municipal council shall take part in, subscribe in aid of, or assist in any way, any political movement in India, or relating to Indian affairs. When there is room for doubt whether any action which an officer or servant proposes to take will contravene this rule, he should refer the matter to the Government through the Executive Authority.
>
> *Note:*—Subversive activities or the express or disloyal sentiments by an officer or servant will be regarded as sufficient ground for dispensing with his services."

From1954, the Municipality represented by the respondent, the Commissioner, began to take action against the ptitioner on the allegation that he was taking part in the activities of the Communist party in contravention of the aforesaid rule, and he was actually dismissed from service in 1954 on a charge of contravention of the above rule. He filed Writ Petition No. 605 of 1955 in this Court against the above order. But while that writ petition was pending, the Director of Public Instruction, Madras set aside the earlier order of dismissal, and as a consequence, the writ petition was withdrawn. On 1st May, 1959 a fresh charge was framed against the petitioner, and it is with this charge that we are now concerned, in these writ petitions. This charge stated that P. N. Rangaswamy, Assistant, North Coimbatore Municipal High School, took active part in and assisted the politial activities of the Communist party during the period from February, 1953 to December, 1955 and thus violated the provision of rule 14 of the Rules relating to the Personal Conduct of Officers and Servants of Municipal Councils. The gist of the allegations in support of the charge was (1) that he attended the Taluk Kisan Conference on 9th February, 1953, at Udumalpet; (2) that he attended the Provincial Kisan Conference held at Perur near Coimbatore on 10th July, 1954 and 11th July, 1954; and (3) that he took part in the conference of the Communist party members held at R. K. Kalyana Mandapam at Coimbatore between 16th and 18th December, 1955. Later, on, that part of the allegations about his partcipation in the Taluk Kisan Conference at Udumalapat was not pressed. But at the enquiry following the charge, which was held by the respondent-Commissioner, evidence was recorded of Sub-Inspector Kesavalu in regard to his participation in the Provincial Kisan Conference at Perur on 10th July, 1954 and 11th July, 1954, and of Head Constable Krishnaswami, regarding his participation at the Conference of the Communist party members held between 16th and 18th December at R. K. Kalyana Mantapam in Coimbatore Town. The Commissioner found that the evidence showed that the petitioner had actively participated in the two conferences mentioned above, and that such participation amounted to contravention of rule 14 of the Personal Conduct of Officers and Servants of Municipal Councils Rules. The Commissioner was of the opinion that there was nothing to show that the petitioner has indulged in subversive activities. Considering these circumstances as well as the position of the petitioner as a senior member of the service, the Commissioner was of the opinion that it would suffice if the punishment of stoppage of increment for two years without cumulative effect was inflicted on him and accordingly he imposed that punishment. The petitioner's appeal to the Director of Public Instruction was dismissed. He has filed Writ Petition No. 1331 of 1964 for the issue of a writ of *certiorari* to quash the order of stoppage of increment. At the same time he has filed Writ Petition No. 1990 of 1964 for the issue of a writ of *mandamus* directing the respondent, the Divisional Inspector of Schools, Coimbatore, to include his name in a panal for appointment of Headmasters, in accordance with rule 2 of the Rules relating to the appointment of Headmasters and Headmistresses.

Taking up first for consideration Writ Petition No. 1331 of 1964, the petitioner's contentions were two fold. Firstly, he contended that there was no acceptable evidence before the respondent-Commissioner for coming to the conclusion that the petitioner had contravened rule 14 aforesaid. Secondly, it was contended that the rule itself was violative of Article 19 (1) (*c*) of the Constitution guaranteeing the right which all citizens of India are entitled to enjoy, in the matter of forming associations or unions.

Taking up for consideration first, the second point mentioned above, it appears to me that rule 14 of the service rules aforesaid, deals with an entirely different matter from the freedom to form associations or unions guaranteed in Article 19 (1) (*c*) of the Constitution. Rule 14 is designed in the interests of discipline and good Government, on the assumption that active participation of Government servants in politics in any of the specific ways mentioned in rule 14, will not be conducive to discipline or to the efficient conduct of the administration. But Article 19 (1) (*c*) of the Constitution gives liberty to all citizens, which will include Government servants, to form associations or unions as long as the exercise of that right does not infringe any of the limitations laid down in Article 19 (4) which saves the operation of existing laws as well as future laws imposing reasonable restrictions in the interest of public order or morality. The decisions cited by the learned Counsel for the petitioner in this context, *Kameshwara Prasad* v. *State of Bihar*[1], dealing with the right of a Government servant to take part in peaceful demonstration, but not strikes in the context of rule 4 (1) of the Bihar Government Servants' Conduct Rules and *O. K. Ghosh* v. *E. X. Joseph*[2], dealing with a similar right in the context of rule 4-A of the Central Civil Service (Conduct) Rules, (1955), were concerned with this aspect of the matter, *i.e.*, freedom of speech and expression, freedom to assemble peacefully, and freedom to form associations under the appropriate sub-divisions of Article 19 (1) of the Constitution. But taking active part in politics as specified in rule 14, like taking part in, subscribeng in aid of or assisting in any way, any political movement in India, must be viewed as an objectionable conduct on the part of a Government servant, harmful to good discipline and efficiency of service, and should not be confused with the several freedoms mentioned in Article 19 of the Constitution. In the decision of this Court reported in *Dakshinamurthi* v. *State of Madras*[3]. to which I was a party, which dealt with a conduct rule for the guidance of Police Officers, analogous to rule 14 above mentioned, the Bench observed:

> " A civil servant of the State is also entitled to this freedom (freedom of political conviction) but by virtue of his special obligations as a civil servant, he is debarred from giving expression to his conviction in a manner which will interfere with his official duties as a loyal servant of the Government, which will give him, by virtue of his official position an undue advantage over other citizens, who do not hold such a public office.............There is nothing in the rules to prohibit a Government servant from having a mental sympathy or an inward leaning in favour of any particular political party *as long as it remains unexpressed in any of the modes declared objectionable by the Rules of Conduct*" (italics mine).

Reference may be made in this connection to the history of various items of legislations in the United States of America which subsequently led the Congress to enact what is known as Hatch Act, 1939. Regarding the justification of such legislation, the Supreme Court of the United States in *United Public Workers* v. *Mitchell*[4] observed :

> "The provisions of section 9 of the Hatch Act and the Civil Service Rule 1 are not dissimilar in purpose from the statutes against political contributions of money. The prohibitions now under discussion are directed at political contributions of energy by Government employees. These contributions too have a

1. A.I.R. 1962 S.C. 1166.
2. A.I.R. 1963 I.C. 812.
3. (1964) 2 M.L.J. 535 : I.L.R. (1964) 1 Mad. 861 at 865.
4. United States Supreme Court Reports, 91 Law Ed. p. 772.

long background of disapproval. *Congress and the President are responsible for an efficient public service*" (italics mine).

It is possible to hold that rule 14 of the Personal Conduct of Officers and Servants of Municipal Council Rules was designed to achieve a similar purpose in the interests of an efficient public service, by providing that Government servants are debarred from taking active part in politics. It cannot therefore be struck down as unconstitutional, as infringing any of the freedoms guranteed in Article 19 of the Constitution.

Taking up for consideration the further question whether the punishment of stoppage of increment for two years without cumulative effect imposed upon the petitioner, can be struck down on the ground that there was no evidence at all to support the finding of the respondent-Commissioner, I am of the opinion that it is not possible to agree with the petitioner's contention. As mentioned already, the findings of the Commissioner were based upon the petitioner's alleged participation, firstly, in the Provincial Kisan Conference at Perur, and secondly, his participation in the Conference of the members of the Communist Party of India held at Coimbatore town between 16th and 18th December, 1955. Regarding the Perur Conference, it is necessary to note that it was a Provincial Kisan Conference, and that there was nothing to show that it was associated in any way with any political party. The Sub-Inspector Kesavalu stated that the petitioner, P. N. Rangaswami, did not make any speeches, but he was observed moving with the delegates for some time and he physically assisted the conference in its successful conduct. Kesavalu, Sub-Inspector also deposed that the petitioner was moving with the delegates and the general public in a manner which could not otherwise be interpreted but as a participant and not as a spectator. But these considerations overlook the main fact that there was no evidence that the Kisan Conference was associated with any political party. The evidence was that public also attend the conference, and the petitioner's participation in that conference might well be consistent with his being a member of the public without being an active member of a political party. Therefore, I agree with the petitioner so far as the Perur Conference is concerned. But in regard to the Conference of the members of the Communist Party of India held at Coimbatore between 16th and 18th December, 1955, the respondent's order has stressed the fact that this conference was held *in camera* and that the public were not allowed to attend the conference. Head Constable Krishnaswami, who stationed himself outside the building where the conference was held, had noticed the petitioner going in and coming out of this *in camera* session of a political party on all the three days when the session lasted. No doubt the Head Constable was not allowed to go in because the meeting was held *in camera*. But his evidence is precise that he saw the petitioner going in and coming out repeatedly, presumably for attending the *in camera* session. He also saw the petitioner moving with the other participants, and from these facts of his observation, he concluded that the petitioner did not attend the conference merely as a spectator, but as an active participant. The evidence thus afforded in support of the charge is circumstantial. But it is noteworthy that the petitioner never attempted to give an explanation as to what made him resort to the place of this conference, whether he went there as a passive spectator notwithstanding that it was an *in camera* session at which the public were excluded. But his plea was a total denial of his having gone to that place at all. In the face of such circumstances, it was open to the respondent to arrive at the conclusion that the circumstances were consistent with the petitioner having actively participated or assisted in the activities of a political party, at the time when this conference was held *in camera*. This finding on the evidence is one which cannot be assailed in writ proceedings nor can this be considered as a case of total want of evidence. I am of the opinion, therefore, that this writ petition deserves to be and is hereby dismissed.

The prayer for *mandamus* in Writ Petition No. 1990 of 1964 was made on the assumption that the refusal to include the petitioner's name in the panel of Headmasters was based upon his adverse record including the stoppage of increment

for two years, which forms the subject-matter of Writ Petition No. 1331 of 1964. Writ Petition No. 1990 of 1964 was filed in order to provide, in the event of the petitioner succeeding in Writ Petition No. 1331 of 1964, for the issue of a direction by way of *mandamus* to the respondent, the Divisional Inspector of Schools, to consider the petitioner's name for being included in the panel without being influenced by the fact of the prior punishment. But since I have held that it is not necessary to quash the order dealt with in Writ Petition No. 1351 of 1964, there is also no necessity to issue a writ in the nature of *mandamus*, which is the prayer in Writ Petition No. 1990 of 1964. This writ petition is also dismissed.

In the circumstances of the case, there will be no order as to costs.

V.K. —————— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR. JUSTICE P. KUNHAMED KUTTI.

P. P. Lakshminarayana Upadhyaya .. *Applicant**

v.

The Premier Bank of India Ltd., Madras (in voluntary liquidation) by its voluntary liquidator, and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 33, rule 5 (d) and (d-1) (Madras)—Application to sue in forma pauperis*—Dismissal under rule 5 (d) and (d-1)—Scope.*

The combined effect of rules 5, 6 and 7 of Order 33, Civil Procedure Code, is that if the Court is satisfied in the first instance that an application to sue *in forma pauperis* is in proper form and is duly presented it can, if it thinks fit, examine the applicant on the merits of his claim and his property. At this stage the opposite party has no *locus standi*. If the Court sees no reason to reject the application on a *prima facie* perusal of it, then it has to give notice to the other parties and fix a date for receiving such evidence as the applicant may adduce to prove that his application is not subject to any of the prohibitions mentioned in rule 5 and at this stage the opposite party is entitled to let in rebutting evidence to the contrary.

In the present case the matter has been considered as at the second stage and it has been found on the evidence that the applicant has no cause of action and the claim is *prima facie* barred by limitation. Of course, the court is not justified in determining a doubtful question of limitation or hold an elaborate enquiry into doubtful and complicated questions of law at that stage. But the present is a case where, the alleged fraud on the face of the plaint is a misnomer and in the absence of fraud, there could be no cause of action.

T.R. Srinivasa Ayyar, for Applicant.

M. A. Srinivasan, for Respondents.

The Court made the following

ORDER.—This application by way of appeal is against the order of the learned Master dismissing the appellant's Application No. 82 of 1965 for leave to institute the suit *in forma pauperis*.

The learned Master has found in his order that the applicant has no cause of action for instituting the suit and that the reason given by the applicant that he had not seen the promissory note filed with the plaint is not acceptable. The applicant had been cross-examined before the learned Master at great length. His evidence and the arguments urged by him were considered by the Master and the conclusions come to by the learned Master are thus set cut by him:

* Appln. No. 297 of 1966, in Appln. No. 82 of 1965 in C.S. (D. No. 11273 of 1965. — 13th March, 1967.

"Thus the evidence tendered by the petitioner is *prima facie* unacceptable and his evidence is not at all believable. Thus his version that he came to know about the alleged fraud only in 1963, cannot be believed, and I find that he had knowledge of it if there be fraud even in 1955. Thus the present suit is clearly barred by limitation. Thus there is no cause of action for the applicant to institute the suit and the suit filed is also barred by limitation."

For the applicant, it is contended before me that the view taken by the learned Master is not correct and that he ought to have held that cause of action and limitation are not questions to be considered at the stage of pauper application, but in the suit.

Order 33, rule 1, Civil Procedure Code, defines a pauper as a person not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in a suit or where no fee is prescribed when he is not entitled to property worth one hundred rupees other than his wearing apparel; and many part of the subject-matter of the suit which the opposite party relinquishes and places at the immediate disposal of the plaintiff shall be taken into account in considering the question of the possession of sufficient means by the plaintiff.

The suit which the present applicant seeks to file *in forma pauperis* is to set aside an *ex parte* decree in favour of the defendants for Rs. 52,269-36 P. and his application for leave to sue as a pauper was opposed on grounds firstly, that he is not a pauper and secondly, that he has no cause of action against the defendants and the suit is barred by law. The learned Master has found that the applicant's means to pay the Court-fee of Rs. 3,920-75 P. on the plaint was not seriously questioned before him. But it is said to have been pressed before him that the suit was barred under Order 33, rule 5 (*d*) and (*d*-1), Civil Procedure Code. Clause (*d*-1) was added in Madras in 1936; so that this Court can reject under Order 33, rule 5 an application for permission to sue as a pauper where, *inter alia* the allegations do not show a cause of action or where the suit appears to be barred by any law.

The applicant's allegations in the plaint are that one S. V. Rao advanced moneys from the Premier Bank of Madras in connection with the construction of a temple for Sri Krishna for which moneys were collected from the public and handed over to S. V. Rao, that Rao had advanced moneys from the Bank and that with a view to facilitate such advances, the plaintiff had given signed blank papers, cheques and blank printed promissory note forms to Rao. It is also alleged that Rao had removed for safe custody from the applicant's thatched shed all accounts, sale deed and title deeds relating to the property and that these were kept in a room in the house of Rao. Since Rao died, the second defendant who was the then Chairman of the Bank and a legal Adviser of the Bank took away the records of the plaintiff including the signed papers, printed promissory notes, etc. and taken advantage of these documents, created a false document in favour of the bank. It is the further allegation of the applicant that C.S. No. 287 of 1953 was filed in the High Court against him on the basis of a promissory note for recovery of Rs. 43,316 that this suit was subsequently transferred to the City Civil Court and that it happened to be decreed *ex parte* on 1st October, 1955, as he could not attend the Court on the aforesaid date. His application to set aside the *ex parte* decree was ordered on condition of his depositing into Court a sum of Rs. 10,000 within two months and the appeal by him to the High Court against this conditions was dismissed. He did not however satisfy the conditions as to deposit so that the Bank obtained a final decree for sale of the building and in execution purchased the property on 13th November, 1959. Certain worshippers then filed a suit for declaration that the building was a public temple and the equitable mortgage on which the Bank had obtained the decree was invalid. This suit was dismissed with a direction to the plaintiffs therein to move the Deputy Commissioner, Hindu Religious and Charitable Endowments. This was done and the Deputy Commissioner, by order dated 15th May, 1963, declared that the temple is a public temple and the appeal filed by the Bank is said to be pending.

In the petition before the Deputy Commissioner, O.A. No. 40 of 1961, one of the directors of the Bank which is now in voluntary liquidation stated that there was no promissory note by the applicant dated 1st October, 1952, and that the promissory note was of the date 7th October, 1952. The decree in execution of which the property was sold was obtained on the foot of a promissory note dated 1st October, 1952 and the case of the applicant is that he came to know of the fraud only on 21st January, 1963 and, therefore, he is entitled to get the *ex parte* decree obtained on the promissory note dated 1st October, 1962, set aside, the allegation being that it had been obtained fraudulently without any mention of the promissory note dated 7th October, 1952. Such in brief are the plaint allegations.

The liquidators of the Bank denied that any fraud was practised on the applicant, that the borrowing from the Bank had been admitted by the applicant himself, that he had also deposited the title deeds with the Bank and that in C.C.A. No. 29 of 1957 it has been held that there has been no dedication of the property and that it is not a public temple. It was in these circumstances that the learned Master considered whether there was any cause of action for the plaintiff's suit and whether the claim was barred by limitation.

Undoubtedly, each case has to be considered on its own allegations. What is characterised as fraud in this particular case is an alleged statement of one of the directors that the promissory note executed by the plaintiff is dated 1st October, 1952 and not 7th October, 1952. The learned Master has found that the applicant had knowledge of the suit promissory note even in 1955 and the alleged discovery of fraud in 1963 has been put forward only with a view to institute the suit as a last ditch fight to deprive the Bank of the money advanced by it for the building and purchase of the property. After having carefully considered the order of the learned Master in the light of the arguments addressed to me for the applicant, I am constrained to state that, on the peculiar facts of this case, the view taken by the learned Master is correct.

This Court has no doubt held in *Rukmnamma* v. *Ramayya*[1], that if the Court is to dismiss an application for leave to sue *in forma pauperis* on the ground that there is no subsisting cause of action, it must be able to draw that conclusion from the allegations in the plaint itself. But as pointed out by Horwill, J., in this case, it is permissible to read with the plaint the documents referred to in the plaint, though the Court should not travel beyond the plaint and perhaps the documents.

The applicant's allegation as to fraud is devoid of any particulars as to the fraud except the fact that the date in the promissory note is different. But the evidence before the learned Master justifies the conclusion come to by him. A Bench of this Court has laid down in *Anganna Goundan* v. *Angamuthu Goundan*[2], that, considering the scheme of Order 33 of the Code of Civil Procedure, the result of the sub-rule (*d*) (i) of rule 5 added by the Madras amendment is that if the Court is satisfied that any suit sought to be filed *in forma pauperis* is barred by any law, it can reject the application for permission to sue as a pauper after examining the applicant only without hearing the other side. But the combined effect of rules 5, 6 and 7 of Order 33, Civil Precedure Code, as pointed out by the Bench is that if the Court is satisfied in the first instance that an application to sue *in forma pauperis* is in proper form and is duly presented it can, if it thinks fit examine the applicant on the merits of his claim and his property. At this stage the opposite party has no *locus standi*. If the Court sees no reason to reject the application on a *prima facie* perusal of it, then it has to give notice to the Government Pleader and the opposite party and fix a date for receiving such evidence as the applicant may adduce to prove that his application is not subject to any of the prohibitions mentioned in rule 5 and at this stage the opposite party is entitled to let in rebutting evidence to the contrary. If this stage is successfully tided over by the applicant, then his application should be registered as a suit. At this second stage there is no warrant for restricting evidence

1. (1943) 2 M.L.J. 189 : I.L.R. (1944) Mad. 262 : 36 L.W. 496.
2. (1956) 1 M.L.J. 300 : I.L.R. (1956) Mad. 1035.

to be let in only in regard to the allegations in the application. Rule 6 expressly allows the opposite party to adduce evidence. It is open to the respondent to let in evidence to show that the suit appears to be barred by any law.

In the case on hand, the matter has been considered as at the second stage and it has been found by the learned Master on the evidence before him that the applicant has no cause of action and the claim is *prima facie* barred by limitation. He has found that the facts relied on by the applicant *viz.*, that the decree was obtained by a false document and that he knew about it in January, 1963 are false. Apparently a clerical error as to the date of the promissory note has been sought by the applicant to be characterised as a fraud and such an attempt, it is obvious, should not be allowed to prevail when, on a consideration of the plaint allegations in the light of the applicant's evidence, it has been found that no fraud, which could give a cause of action as on the date alleged in the plaint, is possible to be really inferred. The rules do not contemplate a conclusion as to fraud because the word is mentioned. What is really intended is that there should be allegations which could be construed as fraud that would give a cause of action and this should appear clearly.

As I have already indicated, the Court, of course, is not justified in determining a doubtful question of limitation or hold an elaborate enquiry into doubtful and complicated questions of law at this stage, by Order 33, rule 5, Civil Procedure Code. But the present is a case where, as shown by the learned Master, the alleged fraud on the face of the plaint is a misnomer and in the absence of fraud, there could be no cause of action. The law relating to this aspect has been laid down by the Supreme Court in *Vijai Pratap* v. *Dukh Haran Nath*[1] thus :

"By the express terms of Order 33, rule 5, clause (*d*), the Court is concerned to ascertain whether the allegations made in the petition show a cause of action. The Court has not to see whether the claim made by the petitioner is likely to succeed ; it has merely to satisfy itself that the allegations made in the petition, if accepted as true, would entitle the petitioner to the relief he claims. If accepting those allegations as true no case is made out for granting relief no cause of action would be shown and the petition must be rejected. But in ascertaining whether the petition shows a cause of action the Court does not enter upon a trial of the issues affecting the merits of the claim made by the petitioner. It cannot take into consideration the defences which the defendant may raise upon the merits nor is the Court competent to make an elaborate enquiry into doubtful or complicated questions of law or fact. If the allegations in the petition, *prima facie*, show a cause of action, the Court cannot embark upon an enquiry whether the allegations are true in fact, or whether the petitioner will succeed in the claims made by him. By the statute the jurisdiction of the Court is restricted to ascertaining whether on the allegations a cause of action is shown ; the jurisdiction does not extend to trial of issues which must fairly be left for decision at the hearing of the suit."

The present, however, is a case where as found by the learned Master, the plaint allegations properly construed along with the evidence of the applicant do not disclose a cause of action and, therefore, the Master was right in dismissing the plaintiff's application for leave to sue *in forma pauperis*.

This application by way of appeal is, therefore, dismissed with costs to the respondents.

V.K. *Application dismissed.*

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1. (1964) 1 S.C.J. 266 : (1962) 2 S.C.R. (1964) 1 An.W.R. (S.C.) 79 : A.I.R. 1962 S.C. (Supp.) 675 : (1964) 1 M.L.J. (S.C.) 79 : 941.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

India Motor Parts and Accessories Ltd., represented by its Director T. S. Santhanam .. *Petitioner**

v.

The Collector of Customs, Madras, and others .. *Respondents.*

Sea Customs Act (VIII of 1878), *section* 40 *and Indian Customs Tariff, items* 71 (b) *and* 75 (11) (v) *and Tariff Ruling Nos.* 32/60 *and* 23/62—*Applicability—Assessment on spare parts as falling under item* 71 (b)—*Authorities, at the time of levy, guided by Tariff—Ruling No.* 32/60—*Later ruling giving benefit of lower customs duty to spare part adapted for use as spare parts and accessories of motor vehicles—Whether later ruling retrospective—Application for refund of excess duty beyond limitation prescribed in section* 40—*Whether maintainable—Meaning of word " adapted" in later ruling—Exercise of powers under Constitution of India,* (1950), *Article* 226.

It cannot be held in the present case that by the use of the word " deemed " in the second ruling there was an intention of applying the ruling retrospectively for the purposes of reopening all earlier assessments. In the context of the use of the term "continue to be made " in the later ruling, one should interpret the use of the word " deemed" in later part of the ruling. So interpreted it will be a proper construction to attribute to the second ruling only a prospective effect.

There is no provision in the Sea Customs Act under which a party can obtain repayment of duty already paid by application to the authorities other than under section 40 thereof. Therefore, the authority to whom the application is made must necessarily act under section 40 and that section contains the important restriction that the claim for refund should be made within three months from the date of payment. So far as those officers are concerned, assuming the petitioner's contentions to be true, it was plainly a case of a levy through misconstruction of the relevant item in the Indian Customs Tariff list, under which roller bearings would fall by the authority making the levy. It is immaterial for the purpose how the misconstruction arose or realised as such. If the later ruling had been given long beyond the period of three months, the aggrieved party will not be able to obtain any relief under section 40 for refund. That does not mean that he is left without a remedy. He could file a suit provided the suit is within time. He could equally get a relief by way of writ under Article 226 of the Constitution for which there is no limitation. But in the later case the Court has a discretion in the matter of condoning the delay upto a reasonable period. So far as the Customs Act and the hierarchy of tribunals under that Act are concerned, the importer must necessarily seek his relief under section 40 of the Act.

So far as this Court is concerned, the administrative rulings may not be binding, and it has to consider the question from the terms of the classification made by the statute. The Court in dealing with the matter can refer to the ruling and refuse to be guided by the ruling according to the view it takes whether the administrative ruling covers a relevant and valid point for the purpose interpretation or not.

Adjectival meaning if given to the word "adapted" will give the benefit of the lower levy to a much larger number of items and must be viewed as a more liberal interpretation of the term "adapted". But the fact that for a certain period the authorities were giving to the word "adapted" its verbal meaning, a meaning which considerably restricted the benefit of the lower levy under item 75 (11), and later on, the authorities were persuaded to give up the method of interpretation and fall back upon a different meaning for the term "adapted" which led to a wider and more liberal application of item 75 (11) of the schedule, will not

* W.P. Nos. 1016 to 1018 of 1964. 5th April, 1967.

be a ground on which this Court in exercise of its powers under Article 226 of the Constitution can proceed to correct the earlier interpretation as one perverse or which no reasonable person will give.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed with W.P. No. 1017 of 1964 on the file of the High Court, the High Court will be pleased to issue (i) a Writ of *certiorari* in W.P. No. 1016 of 1964 calling for the records relating to the order of the appraiser in Ref. No. 388 dated 5th August, 1961 imposing a duty of 75 per cent. under rule 71 (*b*) of the Indian Customs Tariff instead of 25 per cent. under rule 11 (ii) of the said Indian Customs Tariff and quash the same ; (ii) a Writ of *certiorari* in W.P. No. 1017 of 1964 calling for the records relating to the order of the Collector of Customs in Order C. No. 3/2519/62 A.P., dated 29th November, confirming the order of the Assistant Collector of Customs dated 15th September, 1962 in Order No. S. 25/3675/62 Appeal and quash the said orders and (iii) to call for the records in W.P. No. 1018 of 1964 relating to the order of the Collector of Customs in C. No. 3/2519/62 A.P. dated 29th November, 1962 confirming the order of the Assistant Collector of Customs, dated 15th September, 1962 in S. No. 25/3675/62 Appeal and to issue a writ of *mandamus* directing the second respondent to consider on merits instead of dismissing the application as time barred.

V. K. Thiruvenkatachari for *A. R. Ramanathan*, for Petitioner.

The Assistant Government Pleader, for Respondents 1 and 2.

Habibulla Badsha, for Standing Counsel for Central Government, for Respondent 3.

The Court made the following

ORDER.—The petitioner in these three writ petitions is the India Motor Parts Accessories Ltd., Madras, represented by its Director. The first respondent is the Collector of Customs, Madras, and the second respondent is the Assistant Collector of Customs, Madras. The three writ petitions are connected and common questions arise for decision in them. Hence they were heard together. The prior circumstances necessary for the consideration of the matters in controversy are briefly the following :

The petitioner is a dealer in automobile spare parts. The petitioner imported from West Germany automobile spare parts described as straight roller bearings not exceeding 2" diameter, and the goods arrived in the Madras harbour. They were cleared from the Customs at Madras on 5th August, 1961. The customs duty paid for that clearance was 75 per cent. *ad valorem* and came to Rs. 11,913/75 P. According to the petitioner, he was assessed to pay this duty by the customs authorities on the ground that the articles in question fell under item 71 (*b*), Indian Customs Tariff for which the prescribed duty was 75 per cent. *ad valorem*. At that period the customs authorities were guided, for the purpose of making a decision as to the particular item in the customs tariff schedule under which the goods fell for the purpose of levy of duty, by Tariff Ruling No. 32/60 of the Government of India, dated 7th June, 1960, of which Public Notice No. 124/60 was given for the information of importers, clearing agents and the public. This ruling as embodied in the Public Notice above mentioned read thus :

> " Roller bearings not exceeding 2" bore diameter should be assessed to duty under item 71 (*b*) ICT, unless they are specifically designed for use in motor vehicles, in which case they should be assesed under item 75 (11) (*v*) ICT. Roller bearings are assessable under item 72 (3) ICT, if they are specially designed for use with machinery oyerated by power other than manual or animal and if they are not suitable for use with motor vehicles and the like."

It would appear that representations were made subsequently by the trade, contra, and the Government of India reviewed the position and issued on 27th April, 1962 another Tariff Ruling No. 23/62, of which Public Notice No. 64/62 was given on

6th June, 1962 to importers, clearing agents and the public. This later tariff ruling read thus :

> " Classification of Roller Bearings and Taper Roller Bearings should continue to be made on the basis of the Tariff Ruling No. 32/60 communicated in this office Public Notice No. 124/60. The term "specially designed for use in motor vehicles" used in para. 2 of the above public notice, as a criterion for classification of roller bearings under item 75 (11) (*v*) ICT should be substituted by the term "adapted for use as parts and accessories of motor vehicles other than motor cycles and motor scooters."

The main important change made by this later ruling for the purpose of classification of roller bearings was to substitute the term " adopted for use as parts and accessories of motor vehicles other than motor cycles and motor scooters " for the term "specially designed for use in motor vehicles" used in the earlier ruling. Under the earlier ruling, if a particular spare part was found to be specially designed for use in motor vehicles, it could get the benefit of lower excise duty at 25 per cent. *ad valorem* under item 75 (11) (*v*). But under the later ruling, if it was only adapted for use as parts and accessories of motor vehicles other than motor cycles and motor scooters, it could get the benefit of excise duty at the same lower rate. According to the petitioner, the roller bearings which they have imported are not specially designed for use in motor vehicles, but they could be adapted for use in motor vehicles, and therefore, if the second ruling had been applied at the time of the levy of excise duty in 1961, they need have paid only 25 per cent. and not 75 per cent. In fact prior to the ruling in 1960 these spare parts were being assessed only under item 75 (11) (*v*) at 25 per cent. It was only the charge made by the Tariff Ruling No. 32 of 1960 that led to the enhanced levy under item 71 (*b*). But the correct classification was restored by Tariff Ruling No. 23/62. Thereupon, the petitioner applied on 6th September, 1962 to the Assistant Collector of Customs, the second respondent, for refund of the duty of 50 per cent. in the excise duty. The Assistant Collector dismissed the application on the ground that since it was not filed within three months of the date of the collection of excise duty, namely, 5th August, 1961, the application was barred under section 40 of the Sea Customs Act. The petitioner appealed to the first respondent, Collector of Customs, who also dismissed the application, confirming the finding of the Assistant Collector. Against therse decisions, the petitioner has filed the three writ petitions praying for his reliefs in the following manner :

1. In Writ Petition No. 1016 of 1964, the prayer is to quash by a writ of a *certiorari* the original order of the Appraiser on 5th August, 1961 levying customs duty at 75 per cent. *ad valorem*. This writ petition was prsented on 4th December, 1963, two years and four months after the order which is sought to be quashed.

2. The prayer in Writ Petition No. 1017 of 1964 is for the issue of a writ of *certiorari* quashing the order of the Collector of Customs, dated 29th November, 1962, confirming the order of the Assistant Collector of Customs, dated 15th September, 1962. This petition was presented on 4th December, 1963 approximately a year after the appellate order of the Collector of Customs.

3. The prayer in Writ Petition No. 1018 of 1964 is for the issue of a writ of *mandamus* directing the Collector of Customs to restore the appeal to his file and also to direct the appeal to be considered on merits. This prayer is consequent upon the prayer in Writ Petition No. 1017 of 1964. This writ petition was presented on 17th April, 1964, nearly one year and five months after the order of the Collector of Customs.

With regard to the prayer for quashing the original levy itself on 5th August, 1961 in Writ Petition No. 1016 of 1964, the petitioner urges that it was entirely erroneous to classify roller bearings under the general provision in item 71 (*b*). Throughout such roller bearings were classifiable under item 75 (11) (*v*). That was the position which obtained prior to the issue of the Tariff Ruling No. 32 of 1960 on 7th June, 1960 and the original position was restored when Tariff Ruling

No. 23/62 was issued. According to the petitioner, the levy in this case was made on the basis of the Central Board of Revenue Circular which the Collector of Customs was bound to obey. The importer could not at that time raise any objection or to discuss the matter, because he would be always faced with the argument that the ruling would bind the Collector of Customs to give the decision he did. But the later ruling would clearly imply that the earlier ruling was erroneous. Therefore this is a case where the earlier levy at 75 per cent. was illegal and the petitioner applied to the authorities on 4th September, 1962, within three months of the publication of the second ruling (6th June, 1962) for refund of the levy illegally collected. It was, therefore, wrong to apply section 40 of the Sea Customs Act (VIII of 1878) and reject the application as time-barred. Section 40 of the Act is in the following terms:

> " No customs duties or charges which have been paid and of which repayment wholly or in part, is claimed in consequence of the same having been paid through inadvertence, error or misconstruction, shall be returned, unless such claim is made within three months from the date of such payment.
>
> *Explanation.*—Where duty is provisionally assessed under section 29-B, the period of three months shall be computed from the date of final adjustment of duty."

According to the petitioner, there was no question of any erroneous decision of the Collector of Customs under the rules in force at the time of the levy and there is no question of any over-payment through inadvertence, error or misconstruction, so as to attract the three months' bar of limitation under section 40. This is directly a case of a situation where " the Customs Collector himself has been compelled by higher authorities to decide in a particular way and when the same higher authority subsequently says that its original interpretation is wrong, it then becomes the duty of the Customs Collector to alter and modify his earlier wrong decision. The Customs Collector's duty and authority to modify the earlier order emerges only on the date of the new circular."

Learned Counsel Sri Thiruvenkatachari appearing for the petitioner urged that the word " deemed " used in the second ruling will have the effect of making the later ruling retrospective. It would, therefore, follow by this retrospective application, that the earlier ruling itself had been superseded and therefore this would be a further argument to substantiate the contention that the earlier levy was illegal. Learned Counsel relied upon the decision of the Supreme Court in *Amar Singh and others* v. *Custodian, Evacuee Property, Punjab and another*[1], where at page 611 Jagannadhadas, J., who gave the decision of the Bench, has made a remark in regard to a provision in the Constitution:

> "But, in view of the word " deemed " in the amended Article 31 (2-A) it appears likely that the amendment was intended to be retrospective."

It must be observed that the learned Judge does not say in all cases where the word " deemed " is used, a retrospective intention must automatically follow. He has only stated that a retrospective intention was likely. In fact, in the subsequent passages of the report the learned Judge assumed the contrary position for the sake of argument, and proceeded to discuss the effect of the amendment. Therefore, it cannot be held in the present case that by the use of the word " deemed " in the second ruling there was an intention of applying the ruling retrospectively for the purpose of reopening all earlier assessments. In fact, in the later ruling, we find the words " Classification of Roller Bearings and Taper Roller Bearings *should continue to be made* on the basis of the Tariff Ruling No. 32/60." It is in the context of the use of the term italicised " continue to be made," that one should interpret the use of the word " deemed " in the later part of the ruling. So interpreted it will be a proper construction to attribute to the second ruling only a prospective effect.

1. (1957) S.C.J. 574 : (1957) S.C.R. 801 : A.I.R. 1957 S.C. 599 at 611.

Learned Counsel for the petitioner Sri Thiruvenkatachari referred to a decision of the Supreme Court in *State of Madhya Pradesh* v. *Bhailal Bhai*[1]. That case arose out of assessment of sales tax on tobacco imported in Madhya Bharat. Sales-tax was levied on imported tobacco, but no tax was imposed on tobacco produced in the State. In a writ petition filed under Article 226 of the Constitution to quash the assessment, the High Court of Madhya Pradesh held that the levy violated Article 301 of the Constitution and was illegal. The High Court also allowed refund of the tax levied in some of the instances and disallowed in others. The Supreme Court confirmed the decision of the High Court about the illegality of the levy. In regard to the bar of limitation urged in respect of the application for refund of tax erroneously paid, the Supreme Court observed:

> "It cannot now be disputed that this payment was made under a mistake within section 72 of the Indian Contract Act and so the Government to whom the payment has been made by mistake must in law repay it."

After referring to earlier decisions, the Supreme Court held that the High Court in such cases where writ petitions are filed for the purpose of enforcement of fundamental rights and statutory rights could also give consequential relief by ordering repayment of money realised by the Government without the authority of law. Later on, in the same judgment, the Supreme Court was prepared to excuse the time for applying for refund provided the interval that had elapsed before the writ petition was filed was a reasonable period, and observed that the maximum period fixed by the Legislature as the time within which the relief by a suit in a civil Court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 can be measured (at page 1012 of the report). However, before the abovesaid decision can be applied to the circumstances of the present case, there must be an initial decision of a competent authority that the levy of the higher rate of customs duty is illegal. Assuming for the sake of argument that the Assistant Collector of Customs, to whom the petitioner made the application for refund on 4th September, 1962, had jurisdiction to decide that the payment made earlier was an illegal levy, it must be shown further that the Assistant Collector had the power to direct the repayment of the mony under a power other than what was conferred under the Act under section 40. Learned Counsel for the petitioner referred me in this connection to sections 140 and 188 of the Sea Customs Act. But they are quite inapplicable to the present case. In other words, there is no provision under the Sea Customs Act under which a party can obtain repayment of duty already paid by application to the authorities other than section 40. Therefore, the authority to whom the application is made must necessarily act under section 40 and that section contains the important restriction that the claim for repayment should be made within three months from the date of payment. The petitioner will be in time only if the three months rule in this section is to be construed as three months from the date of the discovery of the illegal payment and such discovery must be before the date when the second ruling was published on 5th June, 1962. Only by giving to the rule of limitation in section 40 this arbitrary interpretation will it be possible to treat the application for refund made by the petitioner to the customs authorities on 4th September, 1962 as in time. But there is no warrant to give to the rule of limitation in section 40 any such arbitrary interpretation. That will be *per se* illegal. Therefore, whatever view one may take about the propriety of the ruling when the levy is questioned subsequently either in a regular suit or in a writ petition for enforcing fundamental rights, the position that has to be considered in Writ Petition Nos. 1017 and 1018 of 1964 is whether it is possible to correct the view of the Assistant Collector and the Collector, that the application made to them for refund was barred by time. So far as those officers are concerned, assuming the petitioner's contentions to be true, it was plainly a case of a levy through misconstruction of the relevant item in the Indian Customs Tariff list, under which roller bearings would fall by the authority making the levy. It is immaterial for the purpose whether the misconstruction arose because a later administrative

1. (1964) 15 S.T.C. 450: (1964) 6 S.C.R. 261: A.I.R. 1964 S.C. 1006.

ruling corrected an earlier administrative ruling which was applied at the time of the levy, and by a retrospective operation of the later ruling, the earlier ruling has to be declared as bad. However, the fact would remain that if the later ruling had been given long beyond the period of three months, the aggrieved party will not be able to obtain relief under section 40 for refund. That does not mean that he is left without a remedy. He could file a suit provided the suit is within time. He could equally get a relief by way of writ petition under Article 226 of the Constitution for which there is no specific law of limitation. But in the latter case the Court has a discretion in the matter of condoning the delay upto a reasonable period.

One can in this connection make a brief reference to the provisions in the rules under the Excise Act. There, a shorter period of limitation is fixed for the authorities to recover excise duties short levied or refunded in excess, to which rule 10 will apply. Rule 10-A gives however, no time limit for making a demand of excise duties short levied or payments due to the Government in residual cases where section 10 will not apply. Rule 10-A has been held as applicable by the Supreme Court in cases where by reason of a later Finance Act, the retrospective increase of excise duty had been levied and it was held that while the restricted period of limitation under rule 10 will not apply to such a case, the increased amount can be collected under the residual provision in rule 10-A. But those rules have been designed to enable the Government to collect short levies or excess refunds from assessees to excise duty. But the importer, who claims relief in consequence of over-payment of customs duty, is not given by the Sea Customs Act the benefit of any such residual provision like rule 10-A of the Excise Rules. So far as the Sea Customs Act and the heirarchy of tribunals under that Act are concerned, the importer must necessarily seek his relief under section 40 of the Act. But if section 40 cannot give him a remedy from the hierarchy of officers under the Sea Customs Act, he will have to seek relief by way of suit or by way of writ proceedings.

From the above point of view it will not be possible to afford relief to the petitioner in Writ Petition Nos. 1017 and 1018 of 1964 on the ground that the authorities acted erroneously in treating the application made to them for refund of customs duty as falling under section 40 and barred by the rule of limitation in that section.

I will next take up Writ Petition No. 1016 of 1964 where the petitioner prays that the original assessment order dated 5th August, 1961 levying excise customs duty at 75 per cent. is illegal and should be quashed by a writ of *certiorari* on the ground that the Customs Authority's decision that roller bearings fall under item 71 (*b*) of the Tariff Schedule involves an error patent on the face of the record.

The broad principle to be adopted for the purpose have been laid down by the Supreme Court in *A. V. Venkateswaran* v. *R. S. Wadhwani*[1], which was followed in *Collector of Customs* v. *K. Ganga Setty*[2]. These principles have now become very well known, and they are to the following effect:

> " It is primarily for the Import Control authorities to determine the head or entry in tariff schedule under which any particular commodity fell; but if in doing so, these authorities adopted a construction which no reasonable person could adopt, *i.e.*, if the construction is perverse, then it is a case in which the Court is competent to interfere. In other words, if there were two constructions which an entry could reasonably bear, and one of them which was in favour of Revenue was adopted, the Court has no jurisdiction to interfere merely because the other interpretation favourable to the subject appeals to the Court as the better one to adopt."

So far as this Court is concerned, the administrative rulings may not be binding, and it has to consider the question from the terms of the classification made by the statute, which, in this case, are found in the appropriate schedule of the Tariff Act. The

1. (1962) 1 M.L.J. (S.C.) 83 : (1962) 1 An. W.R. (S.C.) 83 : (1962) 1 S.C.J. 170 : (1962) 1 S.C.R. 753 : A.I.R. 1961 S.C. 1506.

2. (1963) 2 S.C.J. 225 : (1963) 2 M.L.J. (S.C.) 75: (1965) 2 An.W.R. (S.C.) 75: (1963) 2 S.C.R. 277 : A.I.R. 1963 S.C. 1319.

position of the administrative ruling is only as a direction which the Government had issued for the guidance of the customs authority and which the customs authority has no doubt got to adopt, and if he ignores the ruling, he does so at the peril of executive action being against him. But the Court in dealing with the matter can refer to the ruling and refuse to be guided by the ruling according to the view it takes whether the administrative ruling covers a relevant and valid point for the purpose of interpretation or not. Item 75 (11) under which the lower rate of excise duty was claimed by the petitioner is in the following terms:

> " 75. (11) The following articles and parts thereof, adapted for use of parts and accessories of motor vehicles other than motor cycles and motor scooters, namely..................(i) to (iv)
>
> (v) the following other components :
>
> roller bearings..................................."

It is clear from the above that the term found in the main heading " adapted for use of parts and accessories of motor vehicles " is an essential statutory provision, which will apply to " roller bearings," which forms a sub-heading under the main heading. The conflict in the different rulings has arisen because the word " adapted " has acquired according to the dictionary, a use as a verb and also a use as an adjective or adverb. Taking the Concise Oxford Dictionary as a ready book of reference for this purpose, in the transitive verbal form, the word " adapt" means " fit (a thing to another) make suitable for a purpose, modify, alter'. In the adverb and adjective form it has the meaning " calculated " and this meaning is derived from a Latin usage for which the dictionary gives the example *ad captandum (vulgus)*. If the verbal meaning of the word ' adapted ' is to be used, the first ruling would be applicable because the " roller bearings " have to be specially designed, that is, undergo a modification or alteration for use in motor vehicles. The necessity to make a special design of adaptation, will also restrict the type of roller bearing which will get the benefit of the lower levy. But if the adjectival meaning is to be given to the word " adapted " the circumstance that " roller bearings " could also be viewed in the sense of being an article calculated for use in motor vehicles, without any special design or modification or alteration, would make the direction in the second ruling the more proper way of interpreting the term " adapted for use." This will give the benefit of the lower levy to a much larger number of items and must be viewed as a more liberal interpretation of the term " adapted." But the fact that for a certain period the authorities were giving to the word " adapted " a meaning which considerably restricted the benefit of the lower levy under item 75 (11), and later on, on the representations made by the trade, the authorities were persuaded to give up this method of interpretation and fall back upon a different meaning for the term " adapted " which led to a wider and more liberal application of item 75 (11) of the schedule, will not be a ground on which this Court in the exercise of its power under Article 226 of the Constitution can proceed to correct the earlier interpretation as one perverse or which no reasonable person will give, bearing in mind the principles in *Venkateswaran's case*[1].

For the aforesaid reasons, I am of the opinion that even if one were to condone the delay of nearly two years and four months which has occurred on the presentation of Writ Petition No. 1016 of 1964, it is not a proper case where the order challenged in the petition requires to be quashed by a writ of *certiorari*. The petitions are, therefore, dismissed, but without any order as to costs.

S.V.J. *Petitions dismissed.*

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1. (1962) 1 M.L.J. (S.C.) 83: (1962) 1 An. W.R. (S.C.) 83: (1962) 1 S.C.J. 170: (1962) 1 S.C.R. 753: A.I.R. 1961 S.C. 1506.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE K. VEERASWAMI, AND MR. JUSTICE T. RAMAPRASADA RAO.

Madura South India Corporation Private Limited, 80, Sembudoss Street, Madras-1 .. *Petitioner**

v.

The Joint Commercial Tax Officer, Harbour Division III, Madras .. *Respondent.*

Madras General Sales Tax Act (*I of* 1959)—*General Sales Tax Act* (*LXXIV of* 1956) —*Dealer having head office at Madras and branches both inside as well as outside State—Purchase of yarn (declared goods) by dealer—In respect of deliveries to dealers' branches outside State, seller collecting tax under section 30 of the Central Sales Tax Act—Transfer of yarn so purchased from branches outside State to Madras State and sale of the same locally—Whether such sales liable to tax as first sales in Madras State—Applicability of section 6 of Madras Act to declared goods.*

The question for consideration was whether the sales made locally of yarn transferred to the Madras State from the stocks of yarn in the States of Andhra Pradesh and Kerala referable to inter-State sales already charged to tax, are again liable to tax as first sales in the State of Madras.

Held, where the terms of a first sale are such that it may well be said to be an inside sale but it bears also the characteristics of an inter-State sale and, therefore, it has been taxed under the Central Act, that sale being physically a first sale inside the State out of which the inter-State sale has been carved out, it should follow that as the tax levied on the inter-State sale must prevail, there will be no tax liability on the same sale under the local Act on the ground that it is an inside sale. Logically the result will be that when goods pursuant to the inter-State sale have been delivered outside the State but brought back into the State and there sold, that sale cannot be in fact or in law be regarded as the first sale within the meaning of the second schedule to the local Act. Quite apart from section 4 of the Central Act, that will be an inside and also the first sale in the State. Even under the provisions of section 4, inasmuch as the goods were in this State where the contract of an inter-State sale was entered into, it will be on that test too an inside sale, and in any case, it will be such a sale on the appropriation test.

Provisions of section 15 of the Central Act make an inroad into the texture of the local law, so that section 6 of the local Act will have to be read subject to and in conformity with the provisions of section 15 and the policy underlying that section. In other words, section 6 will be inapplicable to sales of declared goods.

It was further held that there was no snapping of the chain of successive sales. Though the sales inside a State followed the inter-State sales, in point of fact the inter-State sales were the first sales in the State but for their inter-State character, so long as the goods involved in the transactions are identical.

The inter-State sale was also factually the inside sale, which occasioned the movement of the goods, that is the first sale in the State, which attracts the tax under the Central Sales Tax Act, and the goods having thus suffered tax, there is no subsequent liability on them to a further single point tax under the local law.

W.P. No. 2684 *of* 1966 :—Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a Writ of *certiorari* calling for the records relating to the summons issued under the Madras General Sales Tax Act 1959 under the rule 47 in Form XII dated 16th November, 1966 issued by the Respondent

* W.P. Nos. 2684, 2685, 2686 of 1966. 3rd July, 1967.

requiring the petitioner to furnish certain vouchers of Cotton Yarn, Branch transfers accounts and particulars relating to the years 1960-61 to 1964-65 and 1966-67 (upto October, 1966) and quash the same, etc.

V. K. T. Chari for *K. Narayanaswami*, for Petitioner.

The Special Government Pleader, for Respondent.

The Order of the Court was made by

Veeraswami, J.—The precise point argued before us is not covered by any authority. But we have come to the conclusion that the assessee, who is the common petitioner, must succeed. The petitioner is a registered dealer with its head office at Madras and branches in Madurai, Rajapalayam and Salem inside the State and also in certain places in the States of Kerala and of Andhra Pradesh including Hyderabad. During the years 1960-61 to 1964-65 and 1966-67 upto October, 1966 it was dealing in iron and steel, electrical goods, sanitary wares, paints, cement, hardware materials, mannure, cloth, yarn, etc., and was being assessed to tax under the Madras General Sales Tax Act on the turnover relating to the business. The gross turnover of the petitioner included sales of yarn by Madurai Mills Limited to the petitioner at its head office in Madras and also branches. The usual manner in which yarn was purchased was this. The head office used to place orders from Madras on Madurai Mills Limited after receiving quotation of price of yarn and supplies were made by the Madurai Mills either to the petitioner's head office or to the branches in accordance with the instructions. Where deliveries were made to the petitioner inside the State, the seller collected the tax due under the Madras General Sales Tax Act with reference to item 3 of the second schedule to the Act. But in respect of deliveries made to the petitioner's branches outside the State, the Madurai Mills collected tax under section 3 of the Central Sales Tax Act. During the year 1965-66 the petitioner brought over to the Madras State certain quantities of yarn from the stock so purchased at its branches in the State of Andhra Pradesh and Kerala, and sold the same to local dealers. On the view that the sales so effected were chargeable to tax as first sales in the State, the respondent called upon the petitioner to produce accounts and certain other documents. This was resisted by the petitioner on the ground that the sales were second sales not liable to tax. On the ground that the respondent has already made up his mind against the assessee, the petitioner has moved this Court, and in one of these petitions the prayer is to quash the notice of the respondent dated 16th November, 1966. This notice required the petitioner to produce the general ledgers and purchase invoices including branch transfer vouchers for cotton yarn relating to the years 1960-61 to 1964-65 and 1966-67 (upto October 1966) in respect of all the places of business in Madras State to enable the respondent to verify the claim of the petitioner that the sales made in the State out of the stock transferred from branches in the States of Andhra Pradesh and Kerala were not liable to tax. There is no dispute that the sales by the Madurai Mills to the petitioner in which deliveries were made to branches in the State of Andhra Pradesh and Kerala have been charged to tax under the provisions of the Central Sales Tax Act. But the point in controversy is whether the sales made locally of yarn transferred to this State from the stocks of yarn in the States of Andhra Pradesh and Kerala referable to inter-State sales already charged to tax, are again liable to tax as first sales in the State of Madras.

In order to appreciate the point we may notice the relevant statutory provisions. Section 3 of the Madras General Sales Tax Act, 1959 is the charging section. Sub-section (1) contemplates a multi-point tax. The following sub-section provides for levy of tax in the case of sale of goods mentioned in the first schedule and at the rate and only at the points specified therein on the turnover in each year relating to such goods. Section 4, however, provides that notwithstanding anything contained in section 3, the sales of declared goods shall be charged to tax only at the rate and at the point specified in the second schedule to the Act. If sales of declared goods have already been charged as inside sales and the same goods were the subject-matter of subsequent inter-state sales, the tax paid on the earlier sales should be refunded as provided

by section 4-A which was introduced by Madras Act (VI of 1963). Section 6 directs that tax under the Act is intended to be in addition to the tax under the Central Act or any other law. Under the second schedule to the Act cotton yarn, excluding cotton yarn waste, is liable to tax under the local Act at the point of first sale in the State at the rate of two per cent. The Central Sales Tax Act defines, 'declared goods' as those declared under section 14 to be of special importance in inter-State trade or commerce. Section 3 lays down the principles for determination when a sale or purchase of goods takes place in the course of inter-State trade or commerce, and section 4 the principles where a sale or purchase takes place. section 6 in the Central Act is the charging section, and section 8 prescribes the rates of tax on inter-State sales. Under section 14 cotton yarn, but not including cotton yarn waste, has been declared to be of special importance in inter-State trade or commerce. Section 15 as amended in 1958 by Act (XXXI of 1958) is as follows:

"Every sales tax law of a State shall, in so far as it imposes or authorises the imposition of a tax on the sale or purchase of declared goods, be subject to the following restrictions and conditions, namely :—

(a) the tax payable under that law in respect of any sale or purchase of such goods inside the State shall not exceed two per cent. of the sale or purchase price thereof, and such tax shall not be levied at more than one stage;

(b) where a tax has been levied under that law in respect of the sale or purchase inside the State of any declared goods and such goods are sold in the course of inter-State trade or commerce, that tax so levied shall be refunded to such a person in such a manner and subject to such conditions as may be provided in any law in force in that State."

In effect section 15 appears to ensure that in the case of declared goods, they should in all circumstances only bear a single burden at a specified stage and at the prescribed rate.

The contention for the petitioner before us is that out of inside sales are carved out inter-State sales and that, therefore, when inter-State sales of declared goods are charged under the Central Sales Tax Act, it is no longer open to the State to tax the subsequent sales of the same goods inside the State as first sales and bring them to tax. We are referred to the history of the law prior and subsequent to 26th January, 1950 and told that the charge under the local sales tax law was made on inter-State sales regarded as inside sales on the basis of the nexus doctrine and that this basis of taxation has been adopted under the Central Sales Tax Act. We agree that it is so. If, therefore, a sale of declared goods can well be said to be a local sale, because of the incidence of the sale, but it also bears the characteristics of an inter-State sale and hence taxed under the Central Sales Tax Act, and if such a sale is in point of fact also a first sale in the State, though of inter-State character, according to the argument of learned Counsel for the petitioner, there can not again be a first sale of the same goods inside the same State, for, it is from the inside sale, which is the first sale in the State, the inter-State sale, which has been charged to tax, has been carved out under the provisions of sections 3 and 4 of the Central Act. On the other hand, for the Revenue the contention is that the inside sale, which followed the inter-State sale, is the first sale in the State, and as under section 6 of the local, Act the tax therein is in addition to the inter-State sales tax, the State is entitled to tax the sales as first sales. It is maintained that the movement the goods are taken outside the State, it brings an end to the chain of local sales and if the goods are brought into the State again and sold, a new chain of sales starts in which the first sale attracts the tax under the second schedule to the Act.

In our opinion, where the terms of a first sale are such that it may well be said to be an insider sale but it bears also the characteristics of an inter-State sale and, therefore, it has been taxed under the Central Act, that sale being physically a first sale inside the State out of which the inter-State sale has been carved out, it should follow that as the tax levied on the inter-State sale must prevail, there will be no tax liability on the same sale under the local Act on the ground that it is an inside sale.

Logically the result will be that when the goods pursuant to the inter-State sale have been delivered outside the State but brought back into the State and then sold, that sale, as we consider cannot, in fact or in law, be regarded as the first sale within the meaning of the second schedule to the local Act. What the position will be when a sale is an inside sale within the meaning of section 4 of the Central Act and is also an inter-State sale, because it occasioned the movement of the goods to another State and out of the goods delivered outside the State pursuant to the inter-State sale, a part has been brought into the State and sold again as an inside sale, in the sence that every incident including delivery is in the State, we need not decide on the facts of this case. Possibly it may even be argued in that case that once a sale is held to be an inside sale under section 4 but it is also an inter-State sale under section 3, there cannot be a subsequent sale inside the State which can be regarded as a first sale for the purpose of the local Act.

The course of transaction as described in the affidavit and which has not been traversed in the counter-statement is that Madurai Mills pursuant to the orders placed by the petitioner put the goods on rail destined to the States of Andhra Pradesh and Kerala and the price was paid in the State of Madras. Quite apart from section 4 of the Central Act, that will be an inside sale and also the first sale in the State. Even under the provisions of section 4, inasmuch as the goods were in this State when the contract on inter-State sale was entered into, it will be on that test too an inside sale, and in any case, it will be such a sale on the appropriation test.

We are not impressed by the contention of the learned Special Government Pleader that section 6 of the local Act enables the State to treat the subsequent sale in the State of Madras as a first sale therein and bring it to tax is addition to the inter-State sales tax. Section 15 of the Central Act is clear enough and it places restrictions and conditions upon the local law. Its intention is that declared goods should suffer tax at only one point and at a prescribed rate. That being the case, the provisions of section 15 make an inroad into the texture of the local law, so that section 6 of the local Act will have to be read subject to and in conformity with the provisions of section 15 and the policy underlying that section. In other words, section 6 will be inapplicable to sales of declared goods. We also think that because the goods pursuant to the inter-State sale were delivered in the States of Andhra Pradesh and Kerala and from out of the stocks transferred to Madras, there were subsequent sales inside the State, there is no snapping of the chain of successive sales. Though the sales inside the State followed the inter-State sales, in point of fact the inter-State sales were the first sales in the State but for their inter-State character, so long as the goods involved in the transactions are identical.

On that view it seems to us that there is no question of charging the sales inside the State which followed the inter-State sales and then making a refund of the local tax. As in our opinion the inter-State sale was also factually the inside sale, which occasioned the movement of the goods, that is the first sale in the State, which attracts the tax under the Central Sales Tax Act, and the goods having thus suffered tax, there is no subsequent liability on them to a further single point tax under the local law.

The petitions are allowed but with no costs.

S.V.J. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE T. VENKATADRI.

K. R. Krishnaswami, Superintendent, Junior Technical School, Government Polytechnic, Coimbatore .. *Petitioner**

v.

The Director of Technical Education, Chepauk, Madras, and others .. *Respondents.*

Constitution of India (1950), *Articles* 309, 310, 311 *and* 315—*Public Service Commission Status and responsibilities of—Appointment of a person to a particular post—Subsequent order offering another post equal in status and pay but with less chances for promotion—Validity—Service conditions—If can be enforced in Courts of law.*

The Public Service Commission has a distinct and distinguished status under our Constitution. It cannot and should not identify itself with the Governmental authorities. When once the Commission expresses its opinion that the petitioner is entitled to the post of the Head of Sound Engineering Section, Central Polytechnic, Madras, it cannot afterwards concur with the view of the Director of Technical Education and say that the petitioner is not a fit person for the post. If the Commission is to change its opinion from time to time to suit the occasion it would be placing itself in a ridiculous situation and would be liable to public criticism. Its approval should be the last word in the selection of a particular candidate for a distinct post.

Where a person is regularly appointed to a particular post, he cannot, by a subsequent order of the Government, be asked to take charge of another post, even if both the posts carry the same status, scales of pay and responsibilities, when there is chances of promotion in the former post while there is no such chances in the latter. Such an order would be in contravention of Article 311 of the Constitution of India.

The original rule that rule relating to service conditions were merely administrative directions not enforceable in Courts of law no longer holds the field. Rules and provisions which fetter the power of the Government to terminate the service of an official will be regarded as conflicting with the rule of ' pleasure ' contained in Article 310 of the Constitution and hence not enforceable against the Government in a Court of law. But a civil servant will be entitled to the protection under Article 311 and such protection cannot be whittled down or negatived by the service rules. Of course executive instructions will not have the status of rules and will not be capable of judicial enforcement. But rules cannot be changed from time to time to suit the requirement of any person or authority. Such a rule can never have retrospective operation which is repugnant to the conception of the rule of law. If the administrative acts appear to be arbitrary and capricious, Courts have a right to interfere in writ jurisdiction to help the persons who are meekly suffering. It is not as if the Courts are powerless to give sufficient redress to the Government servants in respect of their legitimate grievances grounded on favouritism and arbitrary discrimination. The Court should not and cannot dictate how the discretion should be exercised but can compel the legitimate exercise of the discretion.

Case-law discussed.,

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the respondents 1 to 3 to perform their statutory duty by giving effect to the G.Os. dated 16th April, 1958, 12th December, 1961 and 8th January, 1962 and placing the petitioner in proper rank regarding promotion.

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*W.P. No. 1355 of 1964. 29th August, 1967.

K. C. Rajappa, for Petitioner.

The Assistant Government Pleader, for Respondents.

The Court made the following

ORDER.—In this petition for the issue of a writ of *mandamus*, we have to consider whether the petitioner was reduced in rank as per the rules and regulations and conditions of service, and whether the impugned order was passed on an erroneous exercise of jurisdiction, misinterpretation and misconstruction of the Rules.

The writ petitioner entered Government service in the year 1945 and was in charge of teaching and training students in the Government Cinematography and Sound Engineering Section. Before he joined Government Service, he had served as a Cameraman for four years in Motion Picture Producers Combine Limited. While he was working as Cinema Assistant in the Central Polytechnic, he was appointed as Maintenance Engineer, Films Divisions, Bombay, with effect from 29th November, 1954, and, in his place, one B. Sivathanu Pillai, much junior to the petitioner, was appointed. While he was employed as Maintenance Engineer, Films Division, Bombay, the Government of Madras, in their G.O.Ms. No. 734, Education, dated 16th April, 1958 appointed the petitioner, who was on other duty under the Government of India, to act regularly as Head of Sound Engineering Section, Central Polytechnic, Madras, with effect from 12th January, 1956. This order stated that it was without prejudice to his appointment as Maintenance Engineer, Films Division, Bombay. As the petitioner was in Bombay the said Sivathanu Pillai was appointed, by the same Government Order, to act regularly as Head of Sound Engineering Section, Central Polytechnic, Madras. Subsequently the petitioner got himself relieved from the post of Maintenance Engineer, Films Division, and reported to duty as Head of Section Cinematography and Sound Engineering, Central Polytechnic. But the Director of Technical Education posted the petitioner as Special Officer for outdoor films, Central Polytechnic, by his order dated 22nd July, 1959. The Director of Technical Education thereby allowed the said Sivathanu Pillai to continue as the Head of the Cinematography and Sound Engineering Section, for which post the petitioner was originally appointed in G.O.Ms. No. 734, dated 16th April, 1958. The petitioner attacks the validity of this order dated 22nd July, 1959 as also the subsequent order dated 14th March, 1962 and attributes motives and *mala fides* to the Director of Technical Education.

It is an admitted case that the Government themselves passed various orders from time to time first announcing the appointment of the petitioner as Head of Cinematography and Sound Engineering Section, then regularising the same and then notifying the same in the Gazette. It is therefore necessary for me to state in detail the Government Orders passed from time to time starting from 1958 and ending with 14th March, 1962, the date on which the petitioner was appointed to act as Special Officer for out-door films.

By G.O.Ms. No. 734, Education, dated 16th April, 1958, the petitioner was appointed to act regularly as Head of Sound Engineering Section, Central Polytechnic, Madras, with effect from 12th January, 1956 without prejudice to his then appointment. It must be noted that the petitioner was then working as Maintenance Engineer, Films Division, Bombay. The appointment of the petitioner as Head of Sound Engineering Section and Cinematography was also Gazetted on 30th January. 1958. Further, the Government also informed the Director of Technical Education by their Memorandum dated 10th June, 1959, that the posts of Head of Section in Cinematography and Sound Engineering and Special Officer for Outdoor Films were distinct from one another and that as the petitioner was regularly selected by the Public Service Commission and then appointed by Government for the post of Head of Sound Engineering Section, he should be posted on reversion from the Government of India as Head of the Sound Engineering Section, Central Polytechnic, Madras. Pursuant to this Memorandum, the Deputy Secretary to the Government of Madras wrote to the Controller of Films Division, to relieve the petitioner, so as to enable him to join duty as Head of Section,

Cinematography and Sound Engineering, Central Polytechnic, Madras. But curiously when the petitioner, after relief from Bombay, came to report for duty in Madras, he was informed by the Director of Technical Education, in his notification, dated 22nd July, 1959, that he had been posted as Special Officer for outdoor films, Central Polytechnic, Madras. It is particular to note that inspite of this notification by the Director of Technical Education, the Government notified by publishing in the Gazette that the petitioner was appointed to act regularly as Head of Sound Engineering Section, Central Polytechnic, Madras, with effect from 12th January, 1956. In the year 1960, when the Government of Madras established a separate institute known as the Institute of Films Technology, these staff were transferred to the control of the Director of Technical Education with effect from 14th September, 1960. The petitioner was transferred from the Cinematograph and Sound Engineering Section in the Central Polytechnic and was posted as special Officer, Out-door Films, and Sivathanu Pillai was posted as Head of Cinematography and Sound Engineering Section. In G.O.Ms. No. 2907, dated 12th December, 1961, the Government sanctioned the permanent retention of the temporary posts in the Institute of Film Technology, and the Director of Technical Education was directed to take steps to confirm the incumbents in the respective posts, taking into consideration their seniority, etc. It should also be noted that the Government issued general instructions in the month of January, 1962, in G.O. No. 57, Public Service Department dated 8th January, 1962 that orders declaring probation should be issued immediately after the prescribed period of probation expired. The order further stated that except in cases where serious charges were pending, all officers appointed by direct recruitment or by promotion or by transfer before 1st January, 1957 and whose probation had not been declared should be declared to have completed their probation on the strength of that order. In this case, even after six years the petitioner's probation had not been declared. But, we find the Director of Technical Education starting disciplinary proceedings against the petitioner in the month of April for various irregularities committed by him in connection with the supply and erection of an Automatic process Machine in August, 1960. The charges have been pending enquiry till the filing of the writ petition in this Court. While so, the Government passed G.O.Ms. No. 548, dated 14th March, 1962, stating that though the petitioner was recommended by the Public Service Commission originally for the post of the Head of Section of Cinematography and Sound Engineering, the petitioner was away and was not in the teaching line from 1954 to 1959, that he did not possess adequate academic qualification and was therefore not suitable for the post of Head of Section of Cinematography and Sound Engineering. He was therefore recommended for the post of Special Officer for Out-door Films by the Director of Technical Education. The Madras Public Service Commission had concurred in the view of the Director of Technical Education. The Commission suggested that Sivathanu Pillai could be continued in the post of Head of Section in Sound Engineering and the petitioner in the post of Special Officer for Out-door films. Accordingly, the Government issued the above notification, in supersession of the Notification already issued on 16th April, 1958, appointing the petitioner to act regularly as Special Officer with effect from 12 January, 1956, the date on which he was originally appointed as Head of Section, Cinematography and Sound Engineering.

The petitioner states in his affidavit that the Director of Technical Education is prompted by improper motives and that his action was done mainly with a view to give a favoured treatment to Sivathanu Pillai, who has since become the Principal of the Institute of Technology.

It is common case that when the petitioner was appointed as an Assistant in the Government Cinematography and Sound Engineering Section, he was then found fit for the post. During the period 1945 to 1954, he was training students. Even prior to that, he had sufficient experience and had worked as a Camera-man. When he was appointed as Maintenance Engineer, Films Division, Bombay, in his place, the said Sivathanu Pillai was appointed as Cinema Assistant. Admittedly

Sivathanu Pillai was not only his junior but also his student while the petitioner was in the teaching staff. While he was at Bombay, the post of Head of Sound Engineering Section had to be filled up. At that time, the petitioner's seniority and appointment as Head of Sound Engineering Section was considered and determined in consultation with the Public Service Commission. They were aware of the qualification and experience of the petitioner when they selected him for the post of Head of Cinematography and Sound Engineering Section. It was only after the approval by the Commission the Government issued the order appointing him as Head of Cinematography and Sound Engineering Section, and it was also Gazetted. Now the Public Service Commission says that the petitioner is not qualified for the post of Head of Cinematography and Sound Engineering Section. In saying so, the Commission have concurred in the view of the Director of Technical Education. The Public Service Commission have a distinct and distinguished status under our Constitution. The Public Service Commission cannot and should not identify themselves with the Governmental authorities. When once the Commission express their opinion that the petitioner is entitled to the post as Head of the Section of Sound Engineering, they cannot afterwards concur with the view of the Director of Technical Education and say that the petitioner is not a fit person for the disputed post. If the Commission is to change their opinion from time to time to suit the occasion, they would be placing themselves in a ridiculous situation and would be liable to public criticism. Once they give a considered opinion, they must stick to it and their decision must be final at least so far as they are concerned. Their approval is the last word in the selection of a particular candidate for a distinct post. At the time of the selection, the Commission felt that the petitioner possessed the necessary qualification and also experience in technical line. Subsequently, the Government amended the rules regarding qualification for the said post of Head of Section of Cinematography and Sound Engineering. But this certainly would not affect the petitioner, as he entered the departmental service before the amended rules came into force, and further he had the necessary qualification when he entered service.

Learned Counsel for the petitioner contended that, since his client has been regularly appointed as Head of Cinematography and Sound Engineering Section, on account of the notification dated 22nd July, 1959 and the order dated 14th March, 1962 he has lost valuable rights and benefits attached to that post by his being posted as Special Officer. According to him, the petitioner would have got the post of Principal of the Institute of Film Technology, whereas now Sivathanu Pillai, a junior to the petitioner, has been promoted to act as the Principal from the post of Head of Section of Cinematography and Sound Engineering. In the normal course, if the petitioner had been allowed to join the post of Head of Cinematography and Sound Engineering Section, he would have become the Principal of the Institute of Film Technology. Learned Counsel, therefore, contended that that amounted to reduction in rank under Article 311 (2) of the Constitution.

Their Lordships of the Supreme Court in *P. L. Dhingra* v. *Union of India*[1] have observed :

> " A reduction in rank likewise may be by way of punishment or it may be an innocuous thing. If the Government servant has right to a particular rank, then the very reduction from that rank will operate as a penalty, for he will then lose the emoluments and privileges of that rank. If however, he has no right to the particular rank, his reduction from an officiating higher rank to his substantive lower rank will not ordinarily be a punishment. But the mere fact that the servant has no title to the post or the rank and the Government has, by contract, express or implied, or under the rules, the right to reduce him to a lower post does not mean that an order of reduction of a servant to a lower post or rank cannot in any circumstances be a punishment. The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the

1. (1958) S.C.J. 217 : (1958) S.C.R. 828 : A.I.R. 1958 S.C. 36.

order for the reduction also visits the servant with any penal consequences. Thus if the order entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion, then that circumstance may indicate that although in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the Rules, in truth and reality the Government has terminated the employment as and by way of penalty.............. the Court has to apply the two tests mentioned above, namely (1) whether the servant had a right to the post or rank or (2) whether he has been visited with evil consequences of the kind hereinbefore referred to ? If the case satisfies either of the two tests then it must be held that the servant has been punished and the termination of his service must be taken as a dismissal or removal from service or the reversion to his substantive rank must be regarded as a reduction in rank......"

The Supreme Court has referred to this principle in *P. C. Wadhwa* v. *Union of India*[1]. The said principle has been followed by the High Court of Andhra Pradesh in a case on similar facts, *State of Andhra Pradesh* v. *Chinna Reddi*[2]. The respondent in that case entered service in the Salt Department in 1940 as a clerk. His services were transferred to the Factories Department where he completed his probation. He was thereafter appointed as a clerk in the Revenue Department where he was promoted as an Upper Division Clerk. When the State of Andhra was ushered into existence on 1st October, 1953, the respondent sought a transfer to the Andhra Secretariat Service and he was entertained there as an Upper Division Clerk in the Revenue Secretariat, and his services were subsequently regularised. It must be noted that the respondent did not possess the necessary educational qualification for the Secretariat Service. He was therefore for a time reverted to the revenue establishment. As a result of representation made by the respondent, the Government relaxed the rule of the minimum general educational qualification in favour of the respondent and appointed him by transfer to the Secretariat Service. This was in 1955. But in 1960, he was reverted to the revenue establishment. He filed a writ petition the main ground being that the order of reversion deprived him the benefits of the service in the Revenue Secretariat with its higher emoluments which would amount to a reduction to a lower rank and that was not afforded an opportunity as required by Article 311 (2). Summing up the case, the learned Judges observed that the impugned order, though had the garb of an order of transfer from the Secretariat Service to the Revenue Department, visited the respondent with penal consequences and therefore, amounted to a reduction in rank. Similarly in this case, though the Director of Technical Education has stated in his counter affidavit that both the posts carry the same status, scale of pay and responsibilities, while there is chances for promotion from the post of Head of Section of Sound Engineering to the post of Principal of the Institute of Film Technology, there is no such chance of promotion from the post of Special Officer. Even assuming that the two posts carry the same status and scale of pay, the petitioner was designated and was also intended to be posted as the Head of Cinematography and Sound Engineering Section only, as he had the sufficient experience and also seniority. Certainly, he cannot be equated with a junior who was also his student, merely because the latter had obtained a Degree in Cinema-to-graphy. The petitioner has worked for nearly two decades in the Department. His knowledge, experience and age should certainly be taken into consideration while fixing the seniority. I do realise that by issuing a writ of *mandamus*, the present person in the post, namely, Sivathanu Pillai, would be reverted. But justice has got to be done in this case without consideraiton of persons and personalities.

Learned Counsel for the respondents contended that this Court had no jurisdiction to adjudicate the disputed question, as it involved the question of promotion

1. (1964) 4 S.C.R. 598 : A.I.R. 1964 S.C. 423.
2. (1962) 1 An. W.R. 216 : A.I.R. 1963 A.P. 412.

and fixation of seniority coming under the relevant service rules which are of an administrative character and therefore not enforceable in a Court of law.

Under Article 309 of the Constitution of India, provision is made for enactment of laws for regulating the recruitment and conditions of service of persons appointed to public services. Under that article, provision is also made for the making of rules for the same purpose. Any rule or statutory provision, whether made under Article 309 or not, which conflicts with the rule of pleasure declared in Article 310 (1) of the Constitution will not be legally enforceable and will have the effect of an administrative rule. But the question still remains as to what rules or statutory provisions must be regarded as repugnant to the rule of 'Pleasure' contained in Article 310 (1). Before the Constitution of India was framed, in *Venkata Rao* v. *Secretary of State*[1], their Lordships of the Privy Council held that, notwithstanding the breach of the service rule, the matter was not justiciable in a Court of law. The Privy Council held that the words 'subject to the rules' in section 96-B of the Government of India Act, 1919, only amounted to a statutory and solemn assurance and that the remedy for breach of the rules was by approach to the higher authorities in the Government and not legal action in a Court of law. At the same time, their Lordships urged the necessity on the part of the Government to see that supreme care was taken that the rules were strictly carried out in their letter and spirit. This view was also taken by the Privy Council in *Rangachari* v. *Secretary of State*[2]; where however the rule in question related to pension rights of Government servants. The above two cases may be taken to represent the law before the Constitution. After our Constitution, a considerable divergence of views is noticed and this can be summarised. *Krishnamoorthy* v. *State of Madras*[3], laid down that the service rules prescribing the procedure to be followed while taking disciplinary action against Government servants including dismissal, removal and reduction in rank were only of an administrative character and that non-compliance with such rules by itself would not be a matter justiciable in a Court of law. *Chandra Bhan* v. *Union of India*[4], held that a suit for declaration that dismissal was illegal was not maintainable. In *A. Sambandhan* v. *Regional Traffic Superintendent*[5], it was held by this Court that the breach of Service Rules and Regulations as to assignment of Seniority to Government servants was not a justiciable matter. In *Des Raj* v. *State of Punjab*[6], it was held that the Government's failure to observe the fundamental rules in the matter of promotion would not give rise to a cause of action. In *G. Valayya Panthulu* v. *Government of Andhra*[7], it was held that the breach of the Rules and Regulations relating to the termination of service of Government servants would not render the action taken by the Government invalid, where no grave prejudice had been caused to the Government servant in consequence of such breach. In *Lachman Prasad Ram Prasad* v. *Superintendent, Government Harness and Saddlery Factory, Kanpur*[8], the Allahabad High Court held that the scales of pay of Government servants could not be altered to their detriment when such alterations were contrary to the service rules. In *N. Bakshi* v. *Accountant-General, Bihar*[9], it was held by the Patna High Court that an I.C.S. Officer was entitled to a *mandamus* against the Accountant-General ordering him to pay passage money for his wife and children according to the service Rules applicable to him. The Supreme Court in *Parshotam Lal Dhingra* v. *Union of India*[10], held that breach of the Rules and Regulations regarding the procedure to be followed while taking disciplinary action against the Government servant including dismissal, removal and reduction in rank would be justiciable in a Court of law. The Supreme Court impliedly held in *Nohiria Ram* v. *Union of India*[11], that matters like seniority,

1. L.R. 64 I.A. 55: I.L.R. (1937) Mad. 532: (1937) 1 M.L.J. 529 : A.I.R. 1937 P.C. 31.
2. L.R. 64 I.A. 40 : (1937) 1 M.L.J. 515 : I.L.R. (1937) Mad. 517: A.I.R. 1937 P.C. 27.
3. (1951) 1 M.L.J. 709 : A.I.R. 1951 Mad. 882.
4. A.I.R. 1956 Bom. 601.
5. I.L.R. (1958) Mad. 295 : (1957) 2 M.L.J. 541 : A.I.R. 1958 Mad. 243.
6. A.I.R. 1954 Punj. 134.
7. A.I.R. 1958 An. P. 240.
8. A.I.R. 1958 All. 345.
9. A.I.R. 1957 Pat. 515.
10. (1958) S.C.J. 217 : (1958) S.C.R. 828 : A.I.R. 1958 S.C. 36.
11. (1958) S.C.J. 305 : (1958) S.C.R. 922 : A.I.R. 1958 S.C. 113.

of a Government servant were open to judicial determination in so far as they depeded upon the Service Rules. In *Hartwell Prescott Singh* v. *U.P. Government*[1]. the Supreme Court entered into the service rules in order to determine what the status of the Government servant was according to the rules and whether the particular order in question in the case might be regarded as one of reduction in rank so as to attract the application of Article 311 of the Constitution. Therefore the original view that rules relating to service conditions were merely administrative directions not enforceable in Court of law no longer holds the field. It is clear from the above summary of the decisions, that rules and provisions which fetter the power of the Government to terminate the service of an official will be regarded as conflicting with the rule of 'pleasure' and hence not enforceable against the Government in a Court of law. But he will be entitled to the protection under Article 311 and such protection cannot be whittled down or negatived by the service Rules. Of course executive instructions will have the status of rules and will not be capable of judicial enforcement. But rules cannot be changed from time to time to suit the requirement of any person or authority. And such a rule can never have retrospective operation which is repugnant to the conception of Rule of law. If the administrative acts appear to be arbitrary and capricious, the Courts have a right to interfere in writ jurisdiction to help the persons who are meekly suffering. It is not as if the law Courts are powerless to give sufficient redress to the Government servants in respect of their legitimate grievances grounded on favouritism and arbitrary discrimination. When once the shortcomings of the officers is brought to the notice of Court, the Court should without hesitation rectify them. The Court should not and cannot dictate how the discretion should be exercised but can compel the legitimate exercise of the discretion. If the authority has taken a wrong view in law of the nature of the discretion, it is an error of law. The rules should not be made or altered or varied to the detriment of the petitioner who have been appointed according to the existing rules.

Under these circumstances, I feel that the original order passed in G.O.Ms. No. 754 dated 16th April, 1958, appointing the petitioner as the Head of Cinematography and Sound Engineering Section should stand. Consequently the petitioner will be entitled to the rights and benefits accruing therefrom.

The writ petition is accordingly allowed. There will be no order as to costs.

V.K. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE N. KRISHNASWAMY REDDY.

Madras State Wakf Board .. *Appellant**

v.

Tajmul Hussain .. *Respondent.*

Muslim Wakfs Act (XXIX of 1954), *section* 41 (1) (*b*) *and* (*i*)—*Failure to submit accounts by mutavalli —Offence of—Failure, if should be ' wilful '.*

It is true that in criminal prosecutions, normally, *mens rea* is necessary. In certain statutory offences what is required in the absence of any *mens rea* provided under the relevant provision, is that such violation was conscious and deliberate. The word ' wilful ' when used in statutes connotes different concepts such as ' wantonly ', ' intentionally ', ' deliberately ' or ' consciously '. However, to prove an offence falling under section 41 (1) it is not necessary that the offence must be proved to have been committed wilfully, in the sense that such failure to submit accounts was ' deliberate ' or ' intentional'. But even though the word ' wilful ' is not used in section 41 it must be proved by the prosecution that the failure to submit accounts was a conscious failure.

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1. (1957) S.C.J. 148 : (1958) S.C.R. 509 : (1958) 1 An. W.R. (S.C.) 71 : (1958) 1 M.L.J. (S.C.) 71 : (1958) M.L.J. (Crl.) 127 : A.I.R. 1957 1957 S.C. 886.

* Cr. Appeal Nos. 447 of 1965. 27th September, 1967.

Appeal under section 417 (3) of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid Respondent (Accused) of an offence under section 41 (1) (*b*) and (i) of the Wakf Act XXIX of 1954 by the Sixth Presidency Magistrate, Saidapet, Madras in C.C. No. 2390 of 1964 on his file.

M. A. Sathar Syeed, for Appellant.

R. Kamesh, Amicus Curiae.

The Court delivered the following

JUDGMENT :—This appeal has been preferred by the complainant, the Madras State Wakf Board, against the order of acquittal of the accused, Tajmul Hussain, by the Sixth Presidency Magistrate, Saidapet, Madras. The accused is the Muthawalli of the Wakf known as Nabhi Khan Gatak Mosque *alias* Kasab Kadai Mosque at Courtaalam Road, Tirunelveli Town. The accused as the Muthawalli of the mosque is required under section 32 of the Wakf Act, 1954 (hereinafter called the Act) to furnish statement of accounts to the complainant Board. But he failed to submit the accounts for the years 1956-57 to 1962-63. He was prosecuted under section 41 (1) (*b*) and (*i*) of the Act.

P.W. 1 the legal assistant to the Board stated in evidence that the accused had not submitted accounts even though by notice dated 17th December, 1964, he was asked to submit the accounts from 1956-57 to 1962-63. The accused also did not submit the budget estimates, as required under section 31 of the Act. Exhibit P-3 is the notice issued by the complainant to the accused and Exhibit P-4 is the postal acknowledgment.

The accused when questioned under section 342, Criminal Procedure Code, stated that for the years 1956 and 1957 to 1959 he could not keep accounts and hence he did not send accounts. He further stated that in the year 1960 he sent the accounts and the accounts of 1961 were checked by the Inspector. According to him, since 1962, because of the meagre income and the stoppage of allowance, he did not submit accounts. He also added that after 1962, no expenses were incurred. He contended that there has been no wilful default on his part.

The learned Magistrate acquitted the accused mainly on the ground that the prosecution has failed to prove that the failure of submission of accounts by the accused was wilful.

The learned Counsel appearing for the appellant contended that under section 41 of the Act, it is not necessary that the failure to submit the accounts must be wilful. As a matter of fact, the word 'wilful' is not found in the provisions of section 41 (1) (*b*) and (*i*) of the Act. It is true that in criminal prosecutions, normally, *mens rea* is necessary to attribute culpability to the accused. In certain statutory offences, where persons are prosecuted for violation of rules or conditions, what is required in the absence of any *mens rea* provided under the relevant provision, is that such violation was conscious and deliberate. The word 'wilful' when used in statutes connotes different concepts. In certain cases 'wilful' may mean "wantonly". In certain other cases, it may mean 'intentionally' or 'deliberately' and in other cases, it may merely mean 'consciously'. I do not think to prove an offence falling under section 41 (1) of the Act, it (offence) must be proved to have been committed 'wilfully' in the sense that such failure to submit accounts was 'deliberate' or 'intentional'. Even though the word 'wilful' is not used in section 41 of the Act, it must be proved by the prosecution that such failure of submission of accounts was a 'conscious' failure. Otherwise, no act can be attributed to any person if it had not been done consciously. The relevant provisions in section 41 (1) may be extracted hereunder :

"41 (1) If a Muthawalli fails

(*a*) to apply for the registration of a wakf ;

(*b*) to furnish statements of particulars of accounts or returns as required by this Act ;

(c) to (h)..

(i) to do any other act which he is lawfully required to do by or under this Act, he shall unless he satisfies the Court that there was reasonable cause for his failure, be punishable with fine which may extend to one thousand rupees."

This provision makesit clear that mere failure to furnish statements of particulars or accounts or returns is made *prima facie* an offence and a protection is given to the person charged, in the same provision to satisfy the Court that there was a reasonable cause for his failure.

Under section 31 of the said Act, every Muthawalli of a wakf shall submit a budget every year to the Board for approval and under section 32 of the Act, he shall submit a full and true statement of accounts of moneys received and expended by him to the Board. The muthawalli is, therefore, bound by these provisions and should submit the budget report and the accounts, mentioned in the above two sections. In my opinion, it is not necessary for the prosecution to show that the failue to submit accounts or budget was wilful, in the sense that they are deliberate or intentional. It has been found by the learned Magistrate that at least from 1962, the accused had not submitted accounts, the reason being that he did not spend moneys and hence there was nothing to be submitted. Even if he had not spent moneys and the income was meagre, he is bound under the law to produce the accounts and the budget estimates periodically every year. However, the Magistrate has not agreed with the reasons given by him. But as already stated, he acquitted the accused on the ground that the prosecution has failed to show that the failure of submission of accounts was wilful on the part of the accused.

For the foregoing reasons, I find that the accused has committed offences under sections 41 (1) (b) and (i) of the Act. The order of acquittal of the accused by the lower Court is set aside and the accused is convicted under section 41 (1) (b) and (i) of the Act. In the circumstances of the case, I sentence the accused to pay a fine of Rs. 5 (five) under each of the two counts, in default to undergo simple imprisonment for one week. Two weeks' time from this date, is granted for payment of the fines. I wish to place on record the assistance rendered by Sri R. Kamesh, Advocate-*amicus curiae*, appointed in this case.

V.K. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Testamentary and Intestate Jurisdiction.)

PRESENT :—MR. JUSTICE T. RAMAPRASADA RAO.

Andal Ammal .. *Petitioner**

Indian Succession Act (XXXIX of 1925), section 232—Proof of a will—The onus probandi *on the party, propounding the will—One of the attesting witnesses swearing that the testator acknowledged the will as his own—The attesting witness had the* animus attestandi*—Will duly signed by the free and capable testator—Evidence of one of the attesting witnesses that the other was present and attested—Sufficient proof.*

Party propounding the will taking benefit under the will—Defendant who alleges suspicious circumstances of the execution of the will to prove the fact of undue influence—Burden not discharged by the defendant.

Testator had necessary power on the date of execution of the will—The High Court upholding this power ultimately—Intermediary decision to the contral no effect.

Whenever a will is sought to be proved, the *onus probandi* lies upon the party propounding a will and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator.

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* T.O.S. No. 7 of 1966 (O.P. No. 35 of 1966.) 4th November, 1967.

In this case, the will was executed on 16th February, 1955 and registered on 17th February, 1955. The testator lived for seven long years thereafter and died on 19th January, 1962. The attesting witness swore that the testator acknowledged the will as his own, and the normal inference is that the right thumb impression affixed on the said will has been so affixed by the testator out of his own free will and volition. In so far as the attesting witnesses are concerned, the only statutory requisite is that they should have the necessary *animus attestandi* or intention to attest the document. In the instant case the witness attested the testament so that he could bear witness to the fact that the will was acknowledged to be the will of the deceased. The evidence of one of attestors that the other attesting witness also was present and he attested the same in the presence of the testator will suffice. And, therefore, it has to be held that the will has been duly executed and has been duly signed by the deceased and it is the last will of the free and capable testator.

Though the will is propounded by the person who takes the benefit under it, yet the defendant (the other daughter of the deceased) had not discharged her burden in establishing that the circumstances under which the will was executed appear to be suspicious and that it was secured by the imposition of undue influence of the plaintiff. The defendant did not go into the box, nor has she examined any one to prove her case. Excepting for the bare pleading by the defendant, she did not prove anything in support of her plea. On the other hand there is sufficient evidence that the will has been duly executed when the testator was in sound health and in disposing state of mind. The signatures of the attesting officer (Sub-Registrar) also amounts to valid attesting signature to the document.

On 16th February, 1955, the deceased had the necessary power to subject his properties under a testamentary disposition. The capacity to dispose of the properties by a will having been ultimately upheld by this Court, it cannot be contended that the will should fail because of an intermediary decision of this Court wherein his title was not approved.

K. Sarvabhauman and *T. R. Mani*, for Petitioner.

K. V. Sankaran and *K. Renganathan*, for Respondent.

The Court made the following

ORDER.—The Plaintiff in this suit filed O.P. No. 35 of 1966 for the grant of Letters of Administration with the will annexed to the property and credits of her deceased father Rayapadi Nallasubbaiya under section 232 of the Indian Succession Act and under the relevant rules framed in the Original Side of this Court. It was sought to be proved in the common form but as persons interested came on record and attacked the validity of the will, it became necessary for the plaintiff to prove the will in solemn form. The defendant having entered a caveat and opposed the grant, the Original Petition was converted into a Testamentary Original Suit, T.O. S. No. 7 of 1966, and this is the suit which is now being adjudicated upon.

The plaintiff's case is that Exhibit P-2 is the last will and testament of her father Rayapadi Nallasubbaiya and the said will was executed by him duly at Madras on the 16th day of February, 1955 in the presence of witnesses and the same has also been registered in the office of the Sub-Registrar of Sowcarpet as Document No. 3 of 1955 in Book III. The deceased left, besides the plaintiff, another daughter Chengammal who is the defendant in this action. The plaintiff states that the will having been executed in accordance with the prescribed mandates of the statute, she is entitled to the grant as prayed for. . The defendant, however, filed a written statement stating that the grant ought not to be made in favour of the plaintiff on the ground that no will as alleged by the plaintiff was executed by the deceased, and even if it was so executed by the deceased, it was under the influence of the plaintiff and the will was not executed whilst the deceased was in a free and disposing

state of mind. Her main grievance is that as no provision has been made to her and as there is no reason for such differentiation, there is a presumption that the will have been brought about by the undue influence brought to bear upon the deceased by the plaintiff, her husband and others. Hesitantly the defendant pleaded that on the date of death of the deceased his absolute title to the property was in jeopardy as by then the High Court in A.S. No. 136 of 1957, held that the properties which are the subject-matter of the will were the properties of the wife of the deceased. I used the word hesitantly because the judgment of this Court in A.S. No. 136 of 1957 was reversed in L. P. A. No. 13 of 1961, the judgment in which was pronounced by this Court on 7th March, 1963. Exhibit P-1 is the judgment in the said Letters Patent Appeal. Thus, the relevant dates for purposes of Chronology are (1) 16th February, 1955 the date of will, (2) 26th September, 1956 the date of judgment of the first Court in which the defendant claimed that the properties were that of her mother's, (3) 28th October, 1960, the date of the appellate decree in A.S. No. 136 of 1957, High Court, Madras, (4) 19th January, 1962, the date of death of the deceased, and (5) 7th March, 1963, the date of judgment in L. P. A. No. 13 of 1961. I may at once dispose of the last contention of the learned Counsel for the defendant that on the date of death of the deceased he cannot be deemed to have necessary title to the suit properties which enabled him to deal with the properties in a testament. This is an argument without any substance, because on 7th March, 1963, the title of the deceased to the properties was upheld by this Court and on such upholding it dates back to the date of the will, namely, 16th February, 1955. It is also to be noted that on 16th February, 1955, the deceased had the necessary power to subject his properties under a testamentary disposition and that capacity to dispose of the properties by a will having been ultimately upheld by this Court, it cannot be contended by the defendant that the will should fail because of an intermediary decision of this Court in A.S. No. 136 of 1957 wherein his title was not approved.

Rightly, therefore, this Court framed the only issue arising on the pleadings, which runs as follows :—

> " Is the will purported to have been executed by Rayapadi Subbayya executed by him while he was in a sound and disposing state of mind ? "

On the frame of the issue, the onus is on the defendant. But as initially the burden is on the plaintiff who has come up to prove the will in solemn form, the plaintiff opened the case and examined the witnesses on her side. As already stated by me, the will was executed on 16th February, 1955 and registered on 17th February, 1955. The testator lived for seven long years thereafter and died on 19th January, 1962. P.W. 1 one of the attesting witnesses, who impressed me very much, would state that he knew the family of the testator for a considerable length of time and that he attested the will. The plaintiff originally sought to prove the will in a common form and in the said proceedings, P.W. 1 filed an affidavit to the effect that he was present along with the other attesting witness, Tulasi Das, on 16th February, 1955 at the house of the deceased at No. 30, Kutti Maistry Street and that he and the other attesting witness did see the deceased set his right thumb impression at the foot of the testamentary paper Exhibit P-2. This was sufficiently explained by him in the witness box. He admitted candidly that he was not present when the will was signed by the testator by affixing his right thumb impression. But he would state that as soon as he was called to attest the instrument, he expressed a desire that he would read the will and read it loudly to the testator himself so that he could find out from him whether the testator was acknowledging it as his own. His evidence is that on the testator having no objection for this witness reading out the will, he read out the same to him and the testator is said to have told him that he agreed to the contents. This is a case in which the attesting witness swears that the testator acknowledged the will as his own, and the normal inference is that the right thumb impression affixed on the said will has been so affixed by the testator out of his own free will and volition and that was the thing which he unreservedly

expressed to the witness P.W. 1 when he read over the testamentary instrument to him. This is, therefore, a case in which the testator acknowledged the correctness of the will and therefore the thumb impression affixed thereto and this is definitely permissible in law. The object of attestation is for the testator to know that he has ocular evidence of the instrument having been subscribed by the witnesses. In so far as the attesting witnesses are concerned, the only statutory requisite is that they should have the necessary *animus attestandi* or intention to attest this document. In the instant case the witnesses attested the testament so that they could bear witness to the fact that the will was acknowledged to be the will of the deceased. Such acknowledgment by the testator to P.W. 1 that he has made the will and therefore signed the same is equivalent to actually executing the will in the presence of the witnesses. In fact, the proposition that if one of the attestors speak to the signature of the testator, then it is enough and no further probe is necessary to satisfy whether the signature as acknowledged has been affixed. As pointed out by a Full Bench of this Court in *Ganshamdoss* v. *Gulab Bi Bai*[1], a personal acknowledgment of execution need not necessarily be restricted to an express statement to that effect, but may include words or conduct, or both, on the part of the testator which may be construed unequivocally as such an acknowledgment. In this case, by the conduct of the testator it is proved that he has acknowledged the will and therefore the necessary inference has to follow that the testator has duly executed the will by affixing his right thumb impression. P.W. 3 would state that in spite of her efforts she is unable to get the second attesting witness. But there is evidence of P.W. 1, which I accept, that he attested the will of that. The second witness Tulasidoss was also present and he attested the same in the presence of the testator. I am therefore satisfied that the will has been duly executed and has been duly signed by the deceased.

On other aspect in this case is that this is a registered will. P.Ws. 2 and 4 prove such registration. They were the identifying witnesses in the office of the Sub-Registrar. They also speak to the fact that the testator affixed his left thumb impression before the Sub-Registrar and they identified the testator as such witnesses. P.W. 2 made certain interlineations at the instance of the sub-Registrar. But this is obviously with the consent of the testator. The interlineations referred to the writing in Tamil at or near the right thumb impression of the deceased, in Exhibit P-2 to the effect that the thumb impression was the right thumb impression of the testator. There were certain other formal corrections and nothing can be said to be incriminatory in so far as these corrections are concerned. One thing emerges from the evidence of P.Ws. 2 and 4 that there was an unequivocal acknowledgment of the will by the deceased before the Sub-Registrar and in their presence. P.W. 4 Dr. Habibullah Baig, who is a sitting member of the Madras Legislative Assembly and a Councillor of the Corporation of Madras, states that the testator was his patient and that he was in sound health and mind at the time when he caused the registration of the will. P.W. 4 would also say that a day or two prior to the registration, the testator wanted to settle the properties on his daughter and when he was called on that day to go to the sub-Registrar's Office he readily consented because he was very well acquainted with the testator and his family. P.W. 2 was a clerk in the office in which the deceased was working. He also corroborates that the testator acknowledged the will in the Sub-Registrar's Office and that he was the person who made the interlineations at the instance of the Sub-Registrar. Apparently what the witness means is that the Sub-Registrar wanted him to write that it was the right thumb impression of the deceased. The testator was present at that time. It is impossible to conceive that P.W. 2 did not formally consult the testator who was present, to write as against the right thumb impression, that it was so of the testator. The normal presumption would be that such a consultation was made and indeed P.W. 2 made the interlineations and the writing with the consent of the testator.

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1. 53 M.L.J. 709 : I.L.R. 50 Mad. 927 : A.I.R. 1927 Mad. 1054 (F.B.).

The will having been duly registered in the office of the Sub-Registrar, another presumption in favour of its validity arises in law. It cannot be disputed that the identifying witnesses, P.Ws. 2 and 4 were present in the office of the Sub-Registrar with the *animus to attest.* Even the Sub-Registrar is reported to have querried the testator whether the instrument was his and executed by him. This is referred to by P.Ws. 2 and 4. Therefore, the ratio in the Full Bench decision of this Court in *Venkata Sastri* v. *Rahina Bee*[1], applies. The opinion of the Full Bench was that the signatures of the attesting officer would amount to valid attesting signatures to the document if the conditions necessary for a valid attestation have been satisfied and the persons affixing the signatures as the *animus to attest.* Even on this principle I am of the view that the will in this case has been duly executed and duly attested and has been proved in the solemn form by the plaintiff.

The case of the defendant is that as, her interests have been totally disregarded, a presumption against the validity of the will arises and that it should be deemed to have been the result of undue influence exercised by the plaintiff, P.W. 3, who was always living with the deceased. The *onus probandi* regarding the proof of wills cannot be better stated except to adopt the passage of Baron Parke in *Barry* v. *Butlin*[2] which has become a *locus classicus* running as under:

> " These rules are two: the first, the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit that is a circumstance that ought generally to excite the suspicion of the Court and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."

In so far as the first rule is concerned, the plaintiff has satisfied this Court that the will as propounded is the last will of a free and a capable testator. As regards the second, though the will is propounded by the person who takes the benefit under it, yet the defendant has not discharged her burden in establishing that the circumstances under which the will was executed appear to be suspicious and that it was secured by the imposition of undue influence of P.W. 3. The dependant did not go into the box, nor has she examined any one to prove her case. The issue as framed casts the burden of proving the same on the defendant. No attempt has been made. On other hand, the evidence of P.W. 4 who is a doctor is that the testator was sound in health and mind on the date when he registered the will. Excepting for the bare pleading in this case, the defendant has not sought to prove that there is any element of suspicion in the matter of the execution and contents of the will in question. I accept the evidence of P.Ws. 1, 2 and 4 and find that the will has been duly executed when the testator was in sound health and in a disposing state of mind and on the only issue framed in the suit, in favour of the plaintiff and against the defendant.

The suit is therefore decreed and Letters of Administration shall issue with the will Exhibit P-2 annexed thereto as the legatee under the will of the deceased to have effect throughout the State of Madras on her furnishing personal security as is usual As the parties are close relations, there will be no order as to costs.

V.M.K. *Suit decreed.*

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1. (1962) 1 M.L.J. 78: 74 L.W. 701: I.L.R. (1962) Mad. 1; A.I.R. 1962 Mad. 111.
2. (1838) 2 Moore (P.C.) 430.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTHANARAYANAN, *Chief Justice* AND MR. JUSTICE M. NATESAN.

Fraser and Ross, Chartered Accountants Madras-1. .. *Petitioners* *

v.

Sambasiva Iyer and others .. *Respondents.*

Industrial Disputes Act (*XIV of* 1947), *section* 2 (*j*)—*Firm of Chartered Accountants and Auditors—Registered partnership—Business, undertaking or service of—Whether constitutes an ' industry '—Only a learned profession.*

The petitioners are a reputed firm of accountants and auditors. *S*, a stenographer employed therein reached the age of superannuation according to the rules of the firm ; *S* contended that he should be continued in service upto the age of 60 or at least for three years more ; it was not agreed to and he was retired. He instituted proceedings before the Labour Court under the Industrial Disputes Act for retrenchment compensation.

The petitioners raised a preliminary objection that the Labour Court had no jurisdiction as the firm did not constitute an ' industry ' within the meaning of section 2 (j) of the Industrial Disputes Act, 1947. The Labour Court overruled the objection.

The instant writ petition is under Article 226 of the Constitution of India, 1950 to quash that order of the Labour Court.

Held, the true criterion is not the large number of persons employed by the firm or the degree of co-operation between the employee personnel and employer or employers which has to be judged for inclusion in the definition of ' industry ' whether it results in a product or service. The organisation of the profession of Chartered Accountants and Auditor's, the equipment necessary for the practice of the profession and the quality of service rendered are also factors to be considered. So considered it falls under the ' learned profession '. The test of co-operation between capital or employer and labour is relegated to a relatively minor magnitude.

Public accountants today carry tremendous responsibility as auditors of vast enterprises, as liquidators, as financial advisers in all kinds of ways ; they are expected to have a knowledge of commercial laws particularly company law and other laws for the purpose of implementing them.

Health, finance, engineering, teaching and justice are the five fields of learned professional endeavours and it follows that accountancy is not only a profession but a major learned profession at the present time.

A firm of accountants and auditors may employ a large number of clerks, stenographers and trainees to perform the routine or arithmetical duties but the value-decisions, etc., are not reached by the work of those employees. The quality of the service rendered by the accountants involve very high intellectual standards a high code of ethics and considerable responsibility comparable to the qualifications of the learned legal profession.

Chartered Accountants and Auditors constitute a learned profession and it cannot be termed an 'industry' within the definition in section 2 (*j*) of the Industrial Disputes Act, 1947.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to C.P. No. 227of 1964 and to quash the order of the second respondent dated 27th October, 1965, in C. P. No. 227 of 1964.

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* W.P. No. 222 of 1966. 5th January, 1968.

V. Thiagarajan and *M/s. King & Partridge*, Attorneys, for Petitioners.

B. R. Dolia, Advocate, for Respondent 1.

The order of the Court was made by

Ananthanarayanan, C.J.—A question of considerable interest and importance, in the domain of Industrial Law, arises in this proceeding, namely, whether a Firm of Chartered Accountants and Auditors, a registered partnership which is conducting this profession, will be an 'industry' within the scope of section 2 (*j*) of the Industrial Disputes Act. The matter arises for our determination, in the following context of facts. Messrs Fraser and Ross (writ petitioners) had employed the first respondent (V. Sambasiva Ayyar) as a stenographer in the Firm, and, under the Rules relating to his service, he was to be retired in February, 1963, when he would have attained the age of superannuation. We need not now concern ourselves with the minute particulars, but it may be noted that the first respondent was permitted to avail himself of earned leave from 1st February, 1963 to 31st May, 1963, and that he finally retired on 1st June, 1963. He made a claim that he ought to be continued in service till the completion of his 60th year, or at least for three years more, but this was rejected by the Firm, and he instituted a proceeding in the Labour Court, claiming a sum of Rs. 7,254, as retrenchment compensation and wages in lieu of one month's notice. The petitioner-Firm raised a preliminary objection to the maintainability of the petition, claiming that the Firm did not constitute an 'industry', within the meaning of the Industrial Disputes Act. The Labour Court negatived this contention, and this has led to the present proceeding in *certiorari*.

Though, at different stages of the arguments, several of the averments and counter-averments relating to the merits of the claims of the first respondent were particularised before us, they need not be here gone into. Admittedly, it is only the general question which concerns us, and if Messrs. Fraser and Ross, a reputed Firm of Chartered Accountants and Auditors, do not come within the ambit of the statutory definition, the writ petition will necessarily have to be allowed. Nor can the matter be merely considered as *res integra*, though there is no previous judgment of this Court on the subject, or any judgment of the Supreme Court. There are two decisions of the Calcutta High Court, *N. R. Mukherjee* v. *A. H. Just*[1], and *Rabindranath Sen and others* v. *First Industrial Tribunal West Bengal and others*[2] on this specific issue. In the first of these precedents, a contention was raised that the activities of that particular firm of Chartered Accountants were not confined to the business of a Chartered Accountant *simplicitor*, but extended to other activities, which might be viewed as commercial activities and which were not strictly related to the business or profession of a Chartered Accountant. The learned Judge held that evidence was essential on two related questions of fact, and the decision really turned upon considerations of that character. But in the second precedent, *Rabindranath Sen and others* v. *First Industrial Tribunal, West Bengal and others*[2], Banerjee, J., did hold that a Firm of Chartered Accountants and Auditors, like the petitioner-Firm here, might be included within the definition of the expression 'industry' in section 2 (*j*) of the Act. These precedents were considered, and a decision was rendered by Mathew, J., on the very point, in *T. K. Menon & Co.* v. *District Labour Officer*[3]. This Judgment came up in appeal before Govinda Menon and Krishnamurthi Ayyar, in the High Court of Kerala, in *T. K. Menon & Co.* v. *District Labour Officer*[4], and, after a considered review of the case-law, the learned Judge allowed the appeal, and held that the work of a Chartered Accountant or of Chartered Accountants could not be included in the definition of the word 'Industry in section 2 (*j*) of the Act. Subsequent to this judgment of this Division Bench, we have the judgment of the Supreme Court in the *Secretary Madras Gymkhana Club Emloyees Union* v. *Management of the Gymkhana Club*[5]. That reviews the entire prior case-law on the subject, and formulates afresh the principles upon which the matter now before us will really have to be determined.

1. A.I.R. 1961 Cal. 95.
2. (1963) 1 L.L.J. 567.
3. (1966) 2 L.L.J. 608.
4. (1966) 2 L.L.J. 613.
5. Civil Appeal No. 572 of 1966.

At a later stage of this judgment, we propose to refer, in some detail to the profession of Chartered Accountants and Auditors in the context of the Chartered Accountants Act (XXXVIII of 1949), the Chartered Accountants Regulations, 1964, and certain treatises and authorities, such as (1) Professional Ethics of Certified Public Accountants, by John L. Carey (1956), New York and (2) The Accountant in Public Practice, by K. L. Milne (1959), Butterworth & Co., London, as well as extracts from Halsbury's Laws of England. For the moment we shall relegate this task to the subsequent stage, and focus attention on the evolution of case-law. For this purpose, it is really necessary to keep in mind, throughout, three relevant definitions, namely definition of ' industry ' in section 2 (*j*), of ' industrial dispute ' in section 2 (k) and of ' workmen' in section 2 (*s*) of the Industrial Disputes Act. But since those definitions have been set forth *verbatim* in several of the precedents cited at the Bar, including the *Gymkhana Club Case*[1], it is sufficient for our present purpose to extract the definition in section 2 (*j*) alone, namely :

> " 'Industry' means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen."

The true commencement of the case-law, as far as this country is concerned, would appear to be *D. N. Banerjee* v. *P. R. Mukherjee and others*[2], The following dicta of Chandrasekhara Ayyar, J., may be here relevantly set forth :

> " Though the word 'undertaking' in the definition of ' industry ' is wedged in between business and trade on the one hand and manufacture on the other, and though, therefore, it might mean only a business or trade undertaking, still it must be remembered that if that were so, there was no need to use the word separately from business or trade. The wider import is attracted even more clearly when we look at the latter part of the definition which refers to ' calling' service, employment, or industrial occupation or avocation of workmen, ' Undertaking ' in the first part of the definition and 'industrial occupation or avocation' in the second part obviously mean much more than what is ordinarily understood by trade or business.
>
> At the same time, the Court was careful to observe that every aspect of employer and employee connection did not result in industry, and in *the Hospital Mazdoor Case*[3], their Lordships again emphasised that though the words were of a very wide denotation, aline would have to be drawn in a fair and just manner."

While upon this aspect of the commencement of the evolution of the case-law, it is necessary to refer to two decisions from Australia, namely, (*Federated Municipal and Shire Council Employees of Australia* v. *Melbourne Corporation*[4] and *The Federated State School Teacher's Association of Australia* v. *The State of Victoria*[5] These embodied certain dicta of Issacs, J., which have subsequently coloured the perspective of approach to a considerable extent, that an ' industry ' involves "cooperation between employer and employees for the object of satisfying material human needs." It is understood that the co-operation may result in services, as much as in products, and that the contingency of profit-making need not necessarily exist.

We may now pass on to *Baroda Borough Municipality* v. *Workmen*[6], which extended the expression of ' industrial dispute ' to include disputes between the Munipality and its employees " in branches of work that can be regarded as analogous to the carrying on of a trade or business." This was followed by the *Corporation of City of Nagpur* v. *Employees*[7], in which precedent the Supreme Court made a distinction as between (*a*) regal and (*b*) municipal functions of the Corporation, the latter being held analogous to business or trade.

We now come to the *Hospital Mazdoor Case*[3], which constitutes a landmark. This precedent attempted to evolve a working test, and, perhaps, the best manner in which the decision could be explained would be the citation of a passage, not from this decision itself, but from a subsequent commentary furnished by the Supreme Court

1. Civil Appeal No. 572 of 1966.
2. (1953) S.C.R. 302 at 311 : (1953) 1 M.L.J. 195 at 199: (1953) S.C.J. 19 : A.I.R. 1953 S.C. 58.
3. (1960) 1 L.L.J. 251.
4. 26 Com.L.R. 508.
5. 41 Com.L.R. 569.
6. (1957) 1 L.L.J. 8.
7. (1960) 2 S.C.R. 942 : A.I.R. 1960 S.C. 675.

in *National Union of Commercial Employees* v. *Meher (Industrial Tribunal) Bombay and others*[1].

"When in the *Hospital case*[2], this Court referred to the organization of the undertaking involving the co-operation of capital and labour or the employer and his employees, it obviously meant the co-operation essential and necessary, for the purposes of rendering material service or for the purpose of production. It would be realised that the concept of industry postulates partnership between capital and labour or between the employer and his employees. It is under this partnership that the employer contributes his capital and the employees their labour and the joint contribution of capital and labour leads directly to the production which the industry has in view. In other words the co-operation between capital and labour or between the employer and his employees which is treated as a working test in determining whether any activity amounts to an industry, is the co-operation which is directly involved in the production of goods or in the rendering of service. It cannot be suggested that every form or aspect of human activity in which capital and labour co-operate or employer and employees assist each other is an industry. The distinguishing feature of an industry is that for the production of goods or for the rendering of service co-operation between capital and labour or between the employer and his employees must be direct and must be essential.

* * * * *

In the hospitals, the service to the patients begin with proper diagnosis followed by treatment either medical or surgical, according to the requirements of the case. In the case of medical treatment, the patients receive medical treatment according to the prescription and are kept in the hospital for further treatment. In surgical cases, the patients receive surgical treatment by way of operation and then are kept in the hospital for further treatment until they are discharged. During the period of such treatment, all their needs have to be attended to, food has to be supplied to them, nursing assistance has to be given to them, medical help from time to time has to be rendered and all incidental services required for their recovery have also to be rendered. Now, in the case of the activities of an origanised hospital, the co-operation of the employees is thus directly involved in rendering one kind of service or another which it is the duty of the hospital to render. It is true that the patients are drawn to the hospital primarily because of the doctors or surgeons associated with them. But there can be no doubt that the work of the hospital and its purpose are not achieved merely when a surgical operation is performed or medical prescription provided. After medical treatment is determined or a surgical operation is performed, the patient coming to a hospital as an indoor-patient needs all kinds of medical assistance until he is discharged and the services rendered to him both initially and there after until his discharge are all services which the hospital has been established to render and it is the rendering of the said services that the employees of the hospital co-operate and play their part. That is how the test of co-operation between the employer and his employees is satisfied in regard to hospital which are properly organized and maintained. It is, of course, true that the quality, the importance and the nature of the service rendered by different categories of employees in a hospital would not be the same, but nevertheless, all the categories of service rendered by respective classes of employees in a hospital are essential for the purpose of giving service to the patients which is the objective of the hospital. That is how the hospitals satisfy the test of co-operation between the employer and his employees."

In *Ahamedabad Textile Industry Research Association* v. *State of Bombay*[3], the question arose whether an association for research maintained by the Textile industry, and employing technical and other staff fell within the definition. The tests set forth in the *Hospital Mazdoor Case*[2], were recapitulated, and applied to the context of facts. We might immediately pass on to *National Union of Commercial Employees* v. *Meher*[1], which is important, as it held that though a solicitor's firm might be superficially organized like an industrial concern, the Legislature could not have intended to include a 'liberal profession' of that character in the definition of 'industry'. Their Lordships observed at p. 246 :

"A person following a liberal profession does not carry on his profession in any intelligible sense with the active co-operation of his employees and the principal, if not the sole, capital which he brings into his profession is his special or peculiar intellectual and educational equipment. This is why on broad and general considerations which cannot be ignored, a liberal profession like that of an attorney must, we think, be deemed to be outside the definition of 'industry' under section 2(*j*)."

In *Harinagar Cane Farm* v. *The State of Bihar*[4], the agricultural operations of a cane farm purchased by a sugar factory and worked as a department for the supply of sugar-cane, were held to amount to an 'industry' on the facts, though agriculture could not be termed an 'industry' irrespective of circumstances. In *University of Delhi and another* v. *Ramnath*[5], it was held that educational institutions do not

1. (1962) 1 L.L.J. 241 at 244.
2. (1960) 1 L.L.J. 251.
3. (1961) 2 S.C.R. 480 : (1962) 2 S.C.J. 645 : A.I.R. 1961 S.C. 484.
4. ((1964) 2 S.C.J. 806: (1964) 2 S.C.R. 458: A.I.R. 1964 S.C. 903.
5. (1965) 1 S.C.J. 57: (1964) 2 S.C.R. 703 : A.I.R. 1963 S.C. 1873.

constitute an 'industry' within the Act. In the Kerala case *T. K. Menon & Co.* v. *District Labour Officer*[1], emphasis has been laid on the dicta of judges in English decisions, upon what would constitute a 'profession' or a liberal profession. There were extensive citations from the judgments of Scrutton, L.J., in *Commissioners of Inland Revenue* v. *Maxse*[2], and *Currie* v. *Inland Revenue Commissioners*[3].

Subsequently, we have the *Gymkhana Club Case*[4]. Before proceeding to an analysis of this case, certain possible misconceptions might have to be removed. One argument sought to be advanced, on the facts themselves, by the first respondent was that Messrs. Fraser and Ross actually carried on certain activities, which could not be purely characterised as those within the scope of a reputed Firm of Chartered Accountants and Auditors. For this purpose, several records were called for and scrutinised, and emphasis was placed on certain of the documents in an additional statement in the Lower Court. But, as Mr. Thyagarajan, for the petitioner-Firm, has now made it clear beyond doubt, those items of work really relate either to assignments of Liquidation, or Receivership and Managership, most of which were executed many years previously, prior to the Chartered Accountant's Act, 1949, and derived from orders of Court. We are fully satisfied that Messrs. Fraser and Ross have only been conducting the business of the profession, or strictly legitimate extensions of such business, as advisers of firms upon taxation matters, provident fund structures, etc.

Another misconception can be very easily resolved, in terms of the case-law itself. This is that the Firm cannot claim that it is not included within the definition, because here we have a group of Chartered Accountants and Auditors, registered as a partnership firm and carrying on business as such, and not an individual practitioner of the profession, assuming that it is a 'learned profession'. But this distinction was repelled as unsubstantial by their Lordships of the Supreme Court in *National Union of Commercial Employees* v. *Meher*[5].

"In our opinion, the distinction sought to be drawn by Sri Chari between professional service rendered by an individual acting by himself and that rendered by a firm is not logical for the purposes of the application of the test in question. What is true about a firm of solicitor's would be equally true about an individual solicitor working by himself. As the firm engages different categories of employees, a single solicitor also engages different categories of employees to carry out different types of work and so the presence of co-operation between the employees working in a solicitor's office and their employer, the solicitor, could be attributed to the work of a single solicitor as much as the work of the firm ; and, therefore, if Sri Chari is right and in the firm of solicitors is held to be an industry under the Act, the office of an individual solicitor cannot escape the application of the definition of section 2 (*j*)."

The true argument of Mr. Dolia for the first respondent is not this. It is obvious that, so long as the learned profession of the law was strictly being pursued by the persons constituting the partnership, a partnership of lawyers will not be an industry within the meaning of the definition, merely because there are two or more lawyers, and not a single lawyer. Clearly, the same argument will hold good for members of the medical profession. The true argument of Mr. Dolia is that, even if the learned professions are to be excluded, they should be limited to the three institutions, the Law, Medicine, and the Church, to which the appellation was originally employed. As far as Chartered Accountants and Auditors are concerned, it is stressed that there is intimate co-operation between the Chartered Accountants themselves, and the clerical staff, which carries out a great deal of the routine work of actual scrutiny of accounts and effective preparation of the audit material. Without this co-operation, which is substantial, of the employee forces or of labour, whichever it might be termed, the Chartered Accountant could not function at all. It is this which led Banerjee, J., in *Rabindranath Sen and others* v. *First Industrial Tribunal, West Bengal*[6], and others to hold that a firm of Chartered Accountants did come within the definition. The learned Judges stated at p. 579

1. (1966) 2 L.L.J. 613.
2. L.R. (1919) 1 K.B. 647.
3. L.R. (1921) 2 K.B. 332.
4. C.A. No 572 of 1966.
5. (1962) 1 L.L.J. 241 at 244.
6. 67 C.W.N. 232 : A.I.R. 1963 Cal. 310 : (1963) 1 L.L.J. 567.

"A Chartered Accountant doing audit work assisted by stenographers, personal clerks and menial servants, that is to say, doing the entire auditing work, from examination of accounts to the making of the report, all by himself, but only with such subsidiary and incidental help as may be rendered by his stenographers, typists, personal clerks and servants, may not be carrying out an industry. But if a Chartered Accountant carries on auditing work in a magnified scale, with more clients than he can himself manage, and is perforce compelled to have a division of labour, his clerks doing the examination of accounts and he himself drawing up the audit report, on the result of such examination, it may not be said that this type of co-operation is not industry."

But this argument cannot be really sustained, for a very important reason. The true criterion is not the degree of co-operation between the employee personnel and the employer or employers, in the process, which has to be judged for inclusion in the definition, whether it results in a product or service. As we shall see a little later, that has been very clearly laid down in the *Gymkhana Club Case*[1], Logically, it will be almost impossible to draw a line, concerning the degree or the quality of the co-operation, from case to case. Again, the entire argument really overlooks the actual organization of the profession of Chartered Accountants, and the equipment necessary for the practice of this profession, taken in conjunction with the quality of the service rendered. All these features, as we shall presently see, make this profession a 'learned' one, almost indistinguishable from the profession of the lawyer, with a high code of professional ethics, and a firm structure within which the members of the profession have to function.

It is not necessary here to define the word ' profession '. English cases make it unambiguous that even a description may not suffice. But, as Scrutton, L. J., observed in *Commissioners of Inland Revenue* v. *Maxse*[2], the essential idea of 'learned profession ' which cannot 'in the modern context, be merely limited to the original categories of Church, Medicine and Law, is that it is pursuit of an avocation or occupation, substantially involving the *intellect*. There is a complementary feature to this, that the services rendered by a ' learned profession ' are primarily characterised by an equipment of learning, skill or judgment, acquired through *intellectual means* ; the employment of capital for this purpose is or should be largely subsidiary or incidental in character. So long as these criteria are fulfilled, such a profession is a 'learned profession.' Persons organizing this profession, whether singly or banded together do not constitute an 'industry' within the scope of the definition. They may employ other persons for the skilful accomplishment of their tasks ; such a labour force may be large or small. Its services may even be considerable in the quantitative sense. But, ultimately if the qualitative contribution is distinct and supreme, this is not an ' industry' within the meaning of the Act. This appears to be established beyond doubt, relegating in such cases, the test of co-operation between capital or the employer, and labour, to a relatively minor magnitude.

This is very clear from the following discussion in the *Gymkhana Club Case*[1] and we have set forth *verbatim* these passages, which serve to bring out the essential criteria, in terms of the latest formulation by their Lordships of the Supreme Court:

" Of these categories ' undertaking ' is the most elastic. According to Webster's dictionary, 'undertaking' means anything undertaken or 'any business work or project which one engages in or attempts, as an enterprise.' It is this category which has figured in the cases of this Court. It may be stated that this Court began by stating in *Banerji's case*[3], that the word ' undertaking' is not to be interpreted by association with the words that precede or follow it, but after the *Solicitor's case* and the *University case*[4], *it is obvious that liberal arts and learned professions, educational undertakings and professional service dependent on the personal qualifications and ability of the donor of services are not included*. (italic is ours). Although business may result in service, the service is not regarded as material. That is how the service of a Solicitor firm is distinguished from the service of a building corporation. Otherwise what is the difference between the services of a typist in a factory and those of another typist in a Solicitor's Office or the service of a bus driver in a municipality and of a bus driver in a University. The only visible difference is that in the one case the operation is a part of a commercial establishment producing material goods or material services and in the other there is a non-commercial undertaking. The distinction of an essential or direct connection does not appear to be so strong as the distinction that in the one case the result is the production of material goods or services and in the other not."

1. C.A. No. 572 of 1966.
2. L.R. (1919) 1 K.B. 647.
3. (1953) S.C.J. 19 : (1953) 1 M.L.J. 195 : (1953) S.C.R. 302 : A.I.R. 1963 S.C. 58.
4. (1965) 1 S.C.J. 57 : (1964) 2 S.C.R. 703 : A.I.R. 1963 S.C. 1873.

Again :—

"Too much insistence upon partnership between employers and employees is evident in the Solicitors case and too little in the *Association case*. And yet it is impossible to think that this test is universal. What partnership can exist between the Company and/or Board of Directors on the one hand and menial staff employed to sweep floors on the other. What direct and essential nexus is there between such employees and production. This proves that what must be established is existence of an industry *viewed from the angle of what the employer is doing* (italic is ours), and if the definition from the angle of the employer's occupation is satisfied, all who render service and fall within the definition workmen come within the fold of industry irrespective of what they do......... What matters is not the nexus between the employee and the product of the employer's efforts but the nature of the employer's occupation. If his work cannot be described as an industry his workmen are not industrial workmen and the disputes arising between them are not industrial disputes. The cardinal test is thus to find out whether there is an industry according to the denotation of the word in the first part."

It will thus be clear that, if Chartered Accountants and Auditors can be considered as members of a 'learned profession' rendering professional services essentially " dependent on the personal qualifications and ability of the donor of services " (*Gymkhana Club case*[1]), they will not come within the definition. The simple further question is, whether the material placed before us justifies the assumption that Chartered Accountants and Auditors are members of a profession rendering service in this sense, and, therefore, not within the ambit of the definition. We have no doubt whatever that this must be answered in favour of the writ petitioner Firm.

Perhaps, the best account of the profession and its setting, is to be found in *N. E. Merchant* v. *The Bombay Municipal Corporation*[2]. This account runs as follows at page 763 :

" We further think that in considering whether an activity is a profession or not, we may perhaps be guided by the fact that the Church, the Medicine and the Law have been for centuries regarded as learned professions. In each of these three, the individual activity is characterised by personal skill and intelligence and is dependent on personal study, character and integrity. These qualities displayed by the practitioners of these learned professions inspire confidence in persons approaching them for advice or guidance. The first is approached for spiritual comfort and guidance, the doctor for physical or mental ailment and the lawyer for legal advice. But in each case the person who approaches them chooses them according to his own conception of the skill, intelligence and integrity of the person approached, and since he approaches in entire confidence, the priest, the doctor and the lawyer have a corresponding obligation not to betray the confidence and advise his client as best as he can. The same element of trust and confidence must be a test in more or less degree in modern professions. A chartered accountant is approached by his client for advice and guidance in his problems with regard to trade, business or industry, and it is expected that the chartered accountant, to the best of his ability, would be in a position to help him in his difficulties and not betray the confidence that is placed in him. This, in our opinion, is one of the elements which should be sought when considering whether a particular person is practising a profession or is merely doing a business.

" A rapid survey of the general functions performed by a chartered accountant in practice will go to show that the functions are of a highly individualistic character requiring the personal skill, intelligence and integrity on the part of a chartered accountant. The Company Law requires that the accounts of a company should be audited by auditors. Section 226 of the Companies Act, 1956 lays down the qualifications and the disqualifications of auditors. Under that section an auditor will not be qualified unless he is a chartered accountant within the meaning of the Chartered Accountants Act, 1949. Section 227 then prescribes the powers and the duties of the auditors. Every auditor of a company has a right of access at all times to the books of accounts and vouchers of the company and is entitled to require from the officers of the company such information and explanation as the auditor may think necessary for the performance of his duties as an auditor. In carrying out these duties, he cannot be cowed down either by the managing director of the company or the managing agents because his duties require that he shall faithfully carry out his duties as an auditor without fear or favour and audit the accounts of the company in such a manner that the shareholders get a correct picture of the financial position of the company. Punishment is also provided under section 233 of the Indian Companies Act if the auditor's report is made otherwise than in conformity with the requirements of sections 227 and 229 of the Act. In other affairs, also relating to companies, a chartered accountant plays a very vital role. Being trained to maintain costing records he can ascertain the cost of production and of processes at different levels of operations in the manufacture of a product. He can by his expert knowledge help a manufacturing company. His services are also frequently sought in connection with the formation and the financial structure in liquidation of limited companies. He is also called upon to carry out investigation to ascertain the finnacial position of a business in connection with matters such as new issues of share capital, the purchase or

1. C.A. No. 572 of 1966. 2. (196[redacted]

sale of a business, reconstructions and amalgamations. He is also fitted to undertake valuation of shares of public and private companies when amalgamations or reorganisations take place. In other words, the chartered accountant plays a very valuable role in relation to the financial aspects of the business of a company. He is also well equipped for advising the preparations of tax returns. Drastic forms of taxation are being introduced. The chartered accountant has to keep himself abreast of the current and continuing tax information. Section 288 of the Income-tax Act, 1961, shows that a chartered accountant is entitled to appear before the Income-tax authorities as the authorised representative of the assessee."

This description shows the highly responsible character of the vocation, the intellectual standards underlying the nature of the services of a Chartered Accountant, the equipment of learning that he has to obtain before he can practice his profession, and the rigid structure of the profession along with a strict code of professional Ethics, as can be easily gleaned from the Chartered Accountants Act, 1949 and the Regulations of 1964. In *H. A. K. Rao* v. *Council of Institute of Chartered Accountants of India*[1], the following passage at page 1258 refers to the importance of this profession, and its organization as a profession requiring, primarily, the use of intellectual faculties :

" Before we consider the relevant provisions of the Act it is necessary to notice at the outset the nature and objects of the Institute. The Institute is a statutory body having perpetual succession and a common seal. It is governed by the Act and the Chartered Accountants Regulations, 1949, hereinafter called the Regulations. The Central Council of the Institute shall be composed of not more than 24 members elected by the members of the Institute from among the fellows thereof and 6 persons nominated by the Central Government. There are Regional Councils which function in their respective regions subject to the control, supervision and direction of the Central Council on any of its committees. Elections to the Councils are held once in three years. Therefore, the Act through its provisions, regulates the profession of Chartered Accountants. It establishes an Institute of Chartered Accountants and provides for the constitution of a Council for carrying out the objects of the Act. The Central Council, *inter alia*, has the power to admit members to the Institute, to take disciplinary action, and to regulate and maintain the status and standard of the professional qualifications of the members of the Institute. It is needless to say that the profession of chartered accountant is a respectable one and the duties of chartered accountants are onerous and responsible. They are all educated and qualified men and on their efficiency and integrity depends the stability of many of the institutions in the country. It cannot, therefore, be gainsaid that the candidates seeking to become members of the said Council which regulates the conduct of chartered accountants shall necessarily be persons of high integrity and above criticism."

In addition to this we may set forth the following passages from " The Accountant in Public Practice " by K. L. Milne, and from Halsbury's Laws of England, Third Edition, Volume 6.

K.L.Milner's Book "Today public accountants carry tremendous responsibility as auditors of vast enterprises, as trustees in bankruptcy, as liquidators, and as financial advisers in all kinds of ways. The care which accountants take to improve their service, the organization of national and international congresses, the effort that is made to train new members, are but a few of the ways in which accountants indicate, how seriously they take their responsibilities. It can truthfully be said, therefore that a sense of mission exists for accountants, and that it is developing more and more as greater responsibility is placed upon them. (Page 18, Para 2.)

The accountant is expected to have a knowledge of commercial law, particularly Company law bankruptcy law and taxation law, not for the purpose of interpreting it (the province of the lawyer) but for the purpose of implementing it. An accountant can make his knowledge useful only after several years of arduous study and practical experience. Furthermore, in common with other intellectual services, his study must continue throughout his career as the technique of his calling develops and laws affecting it alter. It is largely the professional man's ability to keep abreast of the developments of his calling which brings him success and makes his service of value.

The service provided by the accountant is essentially that of a trained mind. He needs a mental capacity above the average to practise accountancy effectively, and accountants are beginning to realise that a broad academic training is of tremendous value in an accountancy career. (Page 18, Para. 4.)

The leading societies set a very high standard in their administration and in their activities. It is safe to say, therefore, that the leading accountancy bodies, in English speaking countries at least, qualify as professional bodies for the purpose of this definition. (Page 23, Para. 2.)

Since health, finance, engineering teaching and justice are the five main fields of professional endeavour, it follows that accountancy is not only a profession, it is one of the major learned professions of our time. The challenge to accountants is therefore clear and inescapable. (Page 51, para. 1.)

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1. A.I.R. 1967 S.C. 1257.

Halsbury, Para. 748 :—*Auditors Report.*—The auditors of a company must make a report to the members on the accounts examined by them, and on every balance-sheet, every profit and loss account and all group accounts laid before the company in general meeting during their tenure of office. In this context, ' balance-sheet' and ' profit and loss account' include any notices thereon and documents annexed thereto giving information which is required by the Act and thereby allowed to be so given. The Directors' report, if it gives information required by the Act to be given in accounts but permitted thereby to be given in a statement annexed, is to be annexed to the accounts, but the auditors are only to report thereon so far as it gives that information.

The report must state (1) whether they have obtained all the information and explanations which to the best of their knowledge and belief were necessary for the purposes of their audit ; (2) whether, in their opinion, proper books of account have been kept by the company so far as appears from their examination of those books and proper returns adequate for the purposes of their audit have been received from branches, not visited by them; (3) whether the company's balance-sheet and (unless it is framed as a consolidated profit and loss account) profit and loss account dealt with by the report are in agreement with the books of account and returns; (4) whether in their opinion and to the best of their information and according to the explanations given them, the accounts give the information required by the Act in the manner so required and give a true and fair view (i) in the case of the balance-sheet of the state of the Company's affairs as at the end of its financial year ; and (ii) in the case of the profit and loss account, of the profit or loss for its financial year ; or, as the case may be, give a true and fair view thereof subject to the non-disclosure of any matters (to be indicated in the report) which by virtue of the exceptions for special classes of company set forth previously are not required to be disclosed and (5) in the case of a holding company submitting group accounts whether, in their opinion, the group accounts have been properly prepared in accordance with the provisions of the Act so as to give a true and fair view of the state of affairs and profit or loss of the company and its subsidiaries dealt with thereby, so far as concerns members of the company or as the case may be, so as to give a true and fair view thereof subject to the non-disclosure of any matters............which by virtue of the exceptions for special classes of company set forth previously are not required to be disclosed.

In addition, where the accounts do not give such particulars of directors' salaries and pensions or loans to officers as required by the Act, it is the duty of the auditors to include in their report, so far as they are reasonably able so to do, a statement giving the required particulars.

The auditors' report must be read before the company in general meeting and must be open to inspection by any member.

Para. 749 :—*Attendance at general meetings.*—The auditors of a company are entitled to attend an general meeting of the company and to receive all notices or/and other communications relating to any general meeting which any member of the company is entitled to receive and to be heard at any general meeting which they attend on any part of the business of the meeting which concerns them as auditors.

Para. 751 :—*Duties of auditors.*—It is the duty of an auditor to verify not merely the arithmetical accuracy of the balance-sheet, but its substantial accuracy to see that it includes the particulars required by the articles and by statute, and contains a correct representation of the state of the company's affairs. While therefore, it is not his duty to consider whether the business is prudently conducted, he is bound to consider and report to the shareholders whether the balance-sheet shows the true financial position of the company. To do this he must examine the books and take reasonable care to see that their contents are substantially accurate. Except in special cases he should place before the shareholders the necessary information as to the true financial position of the company, and not merely indicate the means of acquiring it. Apart from his statutory duty, which cannot be removed by the articles or an agreement, the exact duties of an auditor are regulated by the contract under which he is employed. The statutory duty is not absolute but depends upon the explanations furnished and information given. But an auditor must ask for information on matters which call for further explanation. An auditor must take steps to learn his statutory duties and his duties under the articles. It is his duty to consider whether payments made by the company before the audit were authorised by the articles and he will be liable for improper payments made by the directors and naturally resulting from his breach of duty. So an auditor who reports confidentially to the directors the insufficiency of the securities on which the capital is invested and the difficulty of realisation, but who only reports to the shareholders that the value depends on realisation, with the result that the shareholders ignorantly approve an improper dividend, is liable to make good the amount paid. An auditor should not be content with a certificate that securities are in the possession of any person or body of persons however trustworthy, unless the certificate is given by a bank or other person who in the ordinary course of business would usually be entrusted with securities."

Consequently, the argument of Mr. Dolia that, with regard to a firm like the writ petitioner, the work is largely made up of the scriptory and clerical duties of the staff employed under the Chartered Accountants, is totally misleading and unacceptable. In the affidavit of the first respondent, this argument has been expressed in the form that 'but for the assistance of the clerks and stenographers the audit report cannot be finalised, and the auditing work could not be carried by the petitioner firm'. Again, 'though the report and certification of the balance-sheet should be given by qualified auditor, the essential part of the main work which is to be performed

prior to the finalisation of such report is turned out only by the employees, *viz.*, clerks and typists but for whose help the petitioner firm cannot prepare its audit report at all.' This is clearly to misconceive the *quality* of the services rendered by those following the esteemable and intellectual profession of Chartered Accountancy. The pursuit of the profession not merely involves a high code of Ethics and very considerable responsibility, but it also involves, essentially value-decisions and judgments, which cannot possibly be derived from clerical assistance, or the performance of routine or arithmetical duties by subordinate staff. Indeed, we have taken the trouble , during the arguments, to obtain and scrutinise the several papers for the several subjects for the Examinations which culminate in entry into the restricted group of qualified Chartered Accountants who are members of the Institute. We are fully satisfied that they involve very high intellectual standards, comparable to the qualification for the legal profession, and that there is very little to distinguish the two professions in that sense.

It follows that, in our view, the Division Bench judgment of the Kerala High Court in *T. K. Menon & Co.* v. *District Labour Officer*[1] must be accepted with respect as laying down the correct law; the excerpts from the judgment in the *Gymkhana Club case*[2] that we have set forth further fortify this conclusion and render it practically inevitable. Since Chartered Accountants and Auditors definitely do constitute a 'learned' or 'liberal profession' which cannot be termed an 'industry' within the definition, it is a necessary consequence that the writ petition must be allowed and the preliminary order of the Labour Court set aside. It is accordingly allowed.

K. G. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE T. VENKATADRI.

Peer Mohamed & Co., Madras ... *Petitioner**

v.

Mohamed Hussain and another ... *Respondentsd.*

Industrial dispute—Dismissed employee ordered to be reinstated by tribunal—Employee should offer himself for the job within reasonable time—Employer not bound to invite him to join.

Where an order of termination from service is set aside by a tribunal, it is the duty of the employee concerned either to demand or insist upon the employer that he should be reinstated in his former job. He should either claim or inform his employer in writing that he is ready and willing to join the service within a reasonable time or give a notice that he should be reinstated failing which he would be taking legal proceedings against the employer. In the absence of any of these things, the employer is under no legal obligation to take steps to reinstate the employee who was dismissed by him but subsequently restored to his job by the order of the tribunal. It is also reasonable that such an employee should express his readiness to join service under the employer within a reasonable time. He cannot keep quite for months and months without expressing any desire on his part to take up the employment, in pursuance of the order of reinstatement passed by the tribunal. What is reasonable time would depend upon the facts and circumstances of each case.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in C.P. No. 8 of 1964 on the file of the Presiding Officer, Additional Labour Court, Madras and quash the order dated 27th October, 1964 and made therein.

1. (1966) 2 L.L.J. 613. 2. C.A. No. 572 of 1966.

*W. P. No. 2175 of 1964. 8 th August, 1967.

N. Govindan and *N. Sitamsukumar*, for Petitioner.

S. Ramaswamy and *R. Ganesan*, for Respondent.

The Court made the following

ORDER.—The petitioner, Peer Mohamed & Co., has filed this petition to quash the order dated 27th October, 1964 of the Presiding Officer, Additional Labour Court, Madras, made in C.P. No. 8 of 1964, directing the petitioner to pay a sum of Rs. 582-33 to the first respondent employee in an application filed by him under section 33-C (2) of the Industrial Disputes Act claiming back-wages for the period commencing from 23rd September, 1961 to 5th May, 1962 and salary for the subsequent period from May, 1962 to 30th November, 1963, amounting in all Rs. 1,350.

The first respondent was originally employed under the petitioner on a salary of Rs. 50 per month. His services were terminated without any reason on 23rd September, 1961. The first respondent preferred an appeal under section 41 of the Madras Shops and Establishments Act before the Commissioner for Workmen's Compensation, Madras. The Additional Commissioner, by his order dated 5th May, 1962 set aside the order of termination of the petitioner and directed reinstatement of the first respondent. The first respondent did not either report himself for duty or call upon the petitioner within a reasonable time to put in service after the order of termination was set aside by the Additional Commissioner for Workmen's Compensation. But it was only on 2nd April, 1963 the first respondent sent a notice complaining that the petitioner had not taken any step in pursuance of the order setting aside the termination of his service. On the other hand, the petitioner has adduced evidence that, though the order of termination of the service of the first respondent was set aside by the Additional Commissioner for Workmen's Compensation as early as 5th May, 1962, the first respondent did not offer himself for the post he held formerly in the company. Further there was material placed before the Labour Court to show that the first respondent was thereafter working in the firm of Jafarali Mothijamal & Bros. and others between July, 1962 and November, 1963. The Presiding Officer of the Labour Court has given a finding that the first respondent had earned Rs. 767-67 during that period. He, therefore, deducted this sum from the amount claimed and passed an order to the effect that the amount due to the first respondent by way of computation was Rs. 582-33. It is this order of the Labour Court the petitioner wants to quash by a writ of *certiorari*.

In my view, an important question arises for consideration namely whether, after an order of termination from service was set aside by a tribunal, it is the duty of the employer to invite the former employee to join service or whether it is the duty of the employee concerned either to claim, demand or insist upon the employer that he should be reinstated in his former job in the company.

It is common case that though the order of termination of the petitioner from service was set aside as early as 5th May, 1962, there is nothing in writing at all till 2nd April, 1963 when for the first time the first respondent complained to the petitioner that he had not taken steps to reinstate him in the post. It is here that I disagree with the contention of learned Counsel for the first respondent. It is not the duty of the employer to take steps to invite the employee in pursuance of the order of a tribunal setting aside the termination order passed by the employer ; but it is the duty of the employee concerned either to claim or inform in writing that he is ready and willing to join the service within a reasonable time or to give a notice that he should be reinstated failing which he would be taking legal proceedings against the employer. In the absence of any of these things, the employer is under no legal obligation to take steps to reinstate the employee who was dismissed by him but subsequently restored to his job by the order of the tribunal. It is also reasonable that such an employee should express his readiness to join service under the employer within a reasonable time. He cannot keep quiet for months and months without expressing any desire on his part to take up the employment, in pursuance of the order of reinstatement passed by the tribunal. What is reasonable time would

depend upon the facts and circumstances of each case. In *Bombay Steel Rolling Mills* v. *K. R. Steel Mills Labour Union*[1], under the terms of settlement, the employer had agreed to take back into service the workmen on their acquittal in criminal proceedings. Some of the concerned workmen were acquitted. But they did not report for work or ask for reinstatement within a reasonable period on their acquittal. In considering what is reasonable time, their Lordships of the Supreme Court observed at page 122 :

> "But if after such acquittal the workmen preferred to remain away and did not ask for work, it is neither fair nor reasonable to ask the management to comply with the demand for reinstatement made months and months after such acquittal."

In that case, the order of reinstatement was set aside by the Supreme Court. The principle that would emerge from this is that, where there is order of reinstatement or agreement to reinstate between the employer and the employee, the employee should report himself for duty within a reasonable time. In the instant case, admittedly, for a period of nearly a year, the first respondent did not take any step to call upon the petitioner to reinstate him in service. Under those circumstances, the Labour Court is wrong in directing the petitioner to pay a sum of Rs. 582-33, especially when it has given a finding that the employee was working elsewhere soon after the order of reinstatement was passed. If the first respondent had been serious about his job under the petitioner, he could have either sent a notice or claimed the job soon after the passing of the order of reinstatement. On the other hand, the first respondent, even after succeeding in his appeal, has shown an attitude of indifference towards the employer and has adopted an 'I don't care' attitude towards him. For the foregoing reasons the order of the Labour Court is quashed.

The Writ Petition is allowed. Ordinarily, I would not have allowed costs, but for the fact that learned Counsel for the first respondent represented to me that his client is fighting the case on a matter of principle. As the issue is now found against him, he will have to pay costs. Counsel's fee Rs. 150.

V.K. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE N. KRISHNASWAMY REDDY.

Kandaswamy .. *Appellant.**

Confession—Extra-judicial and judicial—How far can be acted upon—Manual strangulation—Normal features any symptoms—Absence of conclusive evidence—Effect of.

It is necessary that the prosecution should establish the offence by independent evidence. If once the offence is established, the confession can be taken into consideration to find out as to who the offender is. The prosecution cannot depend upon the confession alone to prove the offence. (*Held on facts* that much reliance cannot be placed on the extra-judicial confession or judicial confession.)

In manual strangulation, normally thumb impression and nail marks will be found on and around the area of the neck indicating the pressure used on the neck. It is also common feature that in such cases, the hyoid bone and the traches will be fractured and there will be injury to the muscles of the neck. In manual strangulation though there may not be external marks, in certain cases bruising of the deeper tissues together with fracture of the hyoid bone will generally be found. Even if the body was highly decomposed, if the muscular tissues are involved, the Medical Officer would have noted it. In the absence of such conclusive evidence, it is very difficult to find that the deceased must have met her death only by manual strangulation.

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1. (1964) 2 L.L.J. 120.

*Cr. A. No. 370 of 1967. 8th September, 1967.

Appeal against the Judgment of the Additional Sessions Judge of the Court of Session of the Coimbatore Division at Coimbatore in Case No. 225 of the Calendar for 1966.

A. Venkata Subbamma, anicus curiae.

R. Calvin Jacob, for Public Prosecutor, for State.

The Court delivered the following :

JUDGMENT.—The appellant who has preferred the appeal from the Jail was committed under section 304 (Part I), Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years by the Additional Sessions Judge, Coimbatore.

The charge against the appellant is that he committed an offence punishable under section 302, Indian Penal Code, for having caused the death of his wife Arukkani by throttling her at about 1 P.M. on 9th September, 1966 at his house in Nochipalayam.

The facts of the prosecution case are briefly these : The appellant married the deceased Arukkani about 10 or 11 months before the occurrence. At the time of her death, she was in advanced stage of pregnancy. The appellant and his wife were living separately in a hut in Nochipalayam village. In the adjacent hut, the appellant's mother, his elder brother Palaniswami and his wife were living. It appears that the appellant gave his share of land to be cultivated on warram basis to his brother Palaniswami and took to weaver's profession. There is some evidence that there were frequent quarrels between the appellant and the deceased.

On the day of the occurrence (9th September, 1966) at about 1 P.M. the appellant and the deceased were in the house. Sometime after that, the appellant went out of the house closing the door and returned to his house at about 5 P.M. The appellant called his mother Muthathal who was working in the field belonging to P.W. 1. Kandaswami Gounder, and she went to the house of the appellant. P.W. 1 Kandaswami Gounder and P.W. 2 Nachimuthu Gounder who were baling water in oor Thottam near the house of the appellant saw the mother of the appellant weeping. P.Ws. 1 and 2 went to the house of the appellant and saw Arukkani lying dead. They saw swelling on the neck of Arukkani. Her tongue was protruding, and her eyes were bulged out. There was bleeding from her mouth and nose. The appellant was near her. When P.Ws. 1 and 2 asked the appellant as to how Arukkani died, the appellant told them that at about 11 A.M. he and his wife had a quarrel and that thereupon he had throttled her to death. P.W. 3 Mottayappa Gounder, the junior paternal uncle of the appellant and his wife P.W. 6 Chellammal also saw Arukkani lying dead. They also stated that the appellant told P.W. 1 that in the course of a quarrel with Arukkani in the noon, he had throttled and killed her. P.W. 10 Mara Navithan, a barber of Nochipalayam was asked to bandage the jaws of the deceased stating that she was bitten by a snake ; but some of the villagers told him that it was not a case of snake bite but that was due to violence. He refused to bandage the jaws of the deceased.

P.W. 1 went to the house of P.W. 11 Subbai Gounder, the Village Munsiff of Sengattusalai Village at about 9 P.M. As he was told that the Village Munsiff would return late in the night, P.W. 1 stayed there. P.W. 11 returned only at about 11 A.M. on the next day. P.W. 1 gave a report Exhibit P-1. The report from the Village Munsiff was received by P.W. 15, the Head Constable at Kundadam Police Station at about 2 P.M. P.W. 16, K. Muthu, the Sub-Inspector of Police, Kundadam Police Station proceeded to the village at about 4-30 P.M. and found Arukkani lying dead inside the hut. He saw swelling on the neck, eyes bulged and tongue protruding. Underneath the mat on which Arukkani was lying, there were blood stains. P.W. 16 held inquest over the body and examined P.Ws. 1 to 3, 6 and 7. The appellant who was right through in his house was arrested by P.W. 16. The body of the deceased was sent to the Government Hospital, Dharapuram, at about 7 A.M. on 11th September, 1966 for post-mortem examination. P.W. 4 Dr. E. Gandhi Bai conducted the autopsy on the dead body. The body was in a

highly de-composed state. She, however, had stated that she could not give any opinion as to the definite cause of death on account of the highly de-composed state of the body. The details of the observation made by P.W. 4 will be stated presently as they appear to be very material in this case for determining the cause of death.

The appellant gave a confession before P.W. 5 Muthuveerappan, the Sub-Magistrate of Udumalpet on 19th September, 1966. The confession which is Exhibit P-7 is as follows :

"I belong to Nochipalayam. It is 10 months since I and Arukkani have been married. Ten days before, on a Friday, at 1 P.M. mid-day, I came to my house for meal from the land. I asked my wife to serve meal. She said that she had not cooked food. Saying "I am going for land, etc. how am I to remain without food ?" I slapped her on the left cheek. She at once stretched out and caught hold of my testicles with both hands. I caught hold of her neck and throttled. She was dead. After lying her, I proceeded to go to Kundadam. Legs and hands trembled. After proceeding for 3 furlongs I returned to the village, and told my mother. On Saturday, the Kundadam Police arrested me. I told them what happened."

The appellant retracted the confession both in the committal and trial Courts.

When questioned under section 342, Criminal Procedure Code, the appellant denied the offence and stated that he came home from his land at about 5-30 P.M. and found the door of his house closed. He pushed open the door and saw Arukkani lying dead. He called his mother and told her about it. He further stated that he did not see the symptoms on the dead body and he did not tell P.Ws. 1, 2 and 6 that he had throttled the deceased. He further stated that he gave confessional statement as tutored by the police due to pressure and threat.

The prosecution depends mainly on the extra-judicial confession made by the appellant to P.Ws. 1 and 2 and the judicial confession made by him to P.W. 5. The other circumstantial evidence let in by the prosecution is that both the appellant and the deceased were seen entering their hut at about noon and that again at about 5 P.M. the appellant was found in his hut when he called out his mother and informed about the death of his wife. This circumstance may not be very material because it is natural for a husband and wife to be together in their hut. The question is as to how far and to what extent the extra-judicial confession and the judicial confession made by the appellant can be acted upon. It is necessary that the prosecution should establish the offence by independent evidence. If once the offence is established, the confession can be taken into consideration to find out as who the offender is. The prosecution cannot depend upon the confession alone to prove the offence. In this case, we have to see whether the prosecution proved that the deceased Arukkani met her death by homicidal violence. In this context, we have to note the details of the observation and the opinion given by P.W. 4 as to the cause of death. P.W. 4, as already stated, found the body of the deceased in a highly de-composed state. She saw the eyes bulging, the tongue protruding and the face showing greenish discolouration. She did not detect any external injury. On dissection, she found the following : The heart was putrified. The lungs were liquefying. There was no injury detected either to the trachea or blood vessel in the neck. The hyoid bone was in tact. The stomach was putrified and contained 6½ ozs. of cholam choru. The liver and kidneys were putrified and the spleen was liquefied. The brain was also liquefied. In the uterus there was the foetus of a dead male child of full term growth. She stated that an account of the highly decomposed state of the body, she could not give her opinion as to the definite cause of death. According to her, the deceased woman would have died not less than 36 hours and not more than 72 hours before autopsy. Apart from the opinion of the doctor, even the observations made by her on the body of the deceased do not conclusively show that the deceased must have died only due to throttling as stated by the appellant in his confession. In manual strangulation, normally thumb impression and nail marks will be found on and around the area of neck indicating

the pressure used on the neck. It is also common feature that in such cases, the hyoid bone and the treaches will be fractured and there will be injury to the muscles of the neck.

Glaister, in Medical Jurisprudence and Toxicology, Ninth Edition, page 192 has stated as follows:

> " In cases of manual strangulation .... As a rule there is extensive bruising of the tissues, which is frequently accompanied by fracture of the laryngeal structures, and, commonly, the hyoid bone. Further, there may be bruising or laceration of the tongue as the result of it having been pressed against, or caught between, the teeth. In some cases, there may be practically no evidence of bruising on the surface of the neck, although fairly extensive bruising of the deeper tissues may be found, together with fracture of the hyoid bone. The bruising of the deeper tissues is usually discrete in character and frequently the muscular tissues are involved. "

It is clear from this statement by Glaister that in manual strangulation though there may not be external marks, in certain cases bruising of the deeper tissues together with fracture of the hyoid bone will generally be found. Even if the body was highly de composed, if the muscular tissues were involved, the Medical Officer would have noted it. In the absence of such conclusive evidence, it is very difficult to find that the deceased Arukkani must have met her death only by manual strangulation.

It is true that the witnesses P.Ws. 1, 2, 3 and 6 found swelling on the neck, eyes bulging, tongue protruding, etc. These symptoms will not be sufficient to determine that she died of strangulation. The death, in all probability, may be due to asphjxia ; but was the death due to strangulation or by any other means is in doubt. Even on facts, it is not known whether she died at 1 P.M. or at any time before 5 P.M. It is the evidence of P.Ws. 3 and 6 that both the appellant and the deceased were in the house at about 1 P.M. and half an hour later, the appellant left the house and returned to the house at about 5 P.M. If the confessional statement is excluded, we do not know as to what happened after the appellant left the house at about 1 P.M. and before he returned to his house. The time of death also is not established by independent evidence. The medical evidence may not be of much use because P.W. 4 puts it generally that the deceased could have died not less than 36 hours and not more than 72 hours before autopsy which was conducted at about 10 A.M. on 11th September, 1966. It may be noted here that the prosecution witnesses came to know about the death of the deceased at about 5 P.M. on 9th September, 1966.

In the circumstances of this case, it may not be safe to rely on the extra-judicial and judicial confessions. The appellant retracted from the judicial confession and stated that because of pressure by the police, he made the statement before P.W. 5. In respect of the extra-judicial confession he stated that the witnesses were not telling the truth. Apart from the statement of the appellant, to my mind, it appears that the confession made by the appellant is not full and complete. Intrinsically, there is no indication from the confession that the appellant has come out to speak the truth and the whole truth voluntarily. The confession is crisp and short and devoid of details. He had not even stated the details of the quarrel and what really transpired between himself and the deceased and even the act of throttling he had not described. If the appellant had come with a voluntary statement without any mental reservation, he would have described fully as to how and in what manner he happened to throttle the deceased, if true. Similarly, he had not given the details of the quarrel and the manner of throttling even to the prosecution witnesses. It is strange that the prosecution witnesses did not ask the appellant as to the nature of the quarrel and as to why he should have throttled her. I am unable to place much reliance upon the extra-judicial confession or judicial confession. There may be a grave suspicion against the appellant that he might have caused her death ; but it cannot take the place of proof.

For the foregoing reasons, the appellant will be entitled to the benefit of doubt. He is acquitted and directed to be released forthwith. The appeal is allowed.

I place on record the valuable assistance rendered by Kumari A. Venkatasubbamma who appeared as *amicus curiae.*

S.V.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

M. O. Muthukrishnan, Managing Trustee of Sri Pachaiamman Temple, Mount Road, Madras .. *Petitioner* *

v.

The Commissioner, Hindu Religious and Charitable Endowments, Madras-34 and another .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (*XXII of* 1959), *sections* 13 21 *and* 101—*Issue of certificate by Deputy Commissioner under section* 101—*Power of Commissioner to revise under section* 21—*Whether third Proviso to section* 101 (1) (b) *excludes revisional jurisdiction.*

Under section 101 the scope of the suit is not directed either to the Certificate granted by the Commissioner or to the order directing delivery of possession made by the Magistrate, but relates to the determination of the title of the aggrieved party, which is preserved intact notwithstanding the order as to the grant of the certificate or orders as to delivery of possession that title can form the subject-matter of a suit notwithstanding orders granting the certificate or order delivering possession.

The power of revision conferred in section 21 of the Act on the Commissioner can be exercised where the Deputy Commissioner grants a certificate, because the right of suit in the third proviso is not directed against the proceeding granting certificate, but deals with a different matter, namely, the question of title which is unaffected by the grant of the certificate.

If the Commissioner exercises the power which the statute has conferred on him clearly he cannot revise his own order under section 21. But where the Deputy Commissioner exercises a power on the strength of a general delegation from the Commissioner, the Commissioner as the supervising authority can rely on section 21 to correct erroneous or illegal orders passed by the Deputy Commissioner exercising in a special case powers under a general delegation.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records from the Commissioner, Hindu Religious and Charitable Endowments, Madras, first respondent herein, relating to the Revision Petition No. 100 of 1963, and quash order and made therein.

T. A. Ramaswami Reddy, for Petitioner.

J. Kanakaraj for Government Pleader, for 1st Respondent.

The Court made the following

ORDER.—The petitioner is the Managing Trustee of Sri Pachaiamman Temple, Mount Road, Madras. He had applied and obtained from the Deputy Commissioner, Hindu Religious and Charitable Endowments, a certificate under section 101 of Madras Act XXII of 1959, that a certain property belongs to Sri Pachaiamman Temple. Such certificate would thereafter enable the petitioner to obtain delivery of possession of the property by application to the Magistrate. At that stage, on

*W.P. No. 954 of 1965. 6th October, 1967.

the initiative of the 2nd respondent a lessee of the property, the first respondent, Commissioner, Hindu Religious and Charitable Endowments, purporting to exercise powers of revision conferred on him under section 21 of Madras Act (XXII of 1959), cancelled the certificate. It is alleged that the main reason which led the Commissioner to interfere with the grant of the certificate was that the 2nd respondent was in possession of the property as a cultivating tenant and it would not be proper for the trustee of the temple to dispossess a cultivating tenant. The petitioner has challenged the order of the Commissioner in this writ petition under Article 226 of the Constitution and prays for the issue of a writ of *certiorari* quashing the above order.

Learned Counsel appearing for the petitioner draws my attention to the specific terms of section 21 (1) of Madras Act (XXII of 1959). That section gives the power to the Commissioner to call for and examine the record of any Deputy or Assistant Commissioner, for the purpose of satisfying himself as to the regularity of such proceeding or the correctness, legality or propriety of any decision or order passed therein. But he has no jurisdiction to deal in the above manner with a proceeding in respect of which a suit or an appeal to a Court is provided by the Act. Learned Counsel for the petitioner refers to the terms of section 101. The third proviso to section 101 (1) (*b*) states that nothing contained in section 101 (1) shall bar the institution of a suit by any person aggrieved by an order under section 101 (1) for establishing his title to the said property. According to the learned Counsel for the petitioner, the terms of this third proviso to section 101 (1) (*b*) would make the issue of a certificate by the Deputy Commissioner a matter outside the jurisdiction of the powers of the Commissioner to revise, under section 21 of the Act. Learned Counsel for the petitioner seeks to draw support for this argument from the decision of a Bench of this Court reported in *R. V. & Co.* v. *Hindu Religious Endowments Board*[1], which arose under the Madras Hindu Religious Endowments Act (II of 1927). Section 76 (1) of that Act stated that no exchange, sale or mortgage and no lease for a term exceeding five years of any immovable property belonging to any math or temple shall be valid or operative unless it is necessary or beneficial to the math or temple and is sanctioned by the Board in the case of maths and excepted temples and by the committee in the case of other temples. Section 76 (2) stated that the trustees of the math or temple or any person having interest may, within one year of the date of the order of the Board or Committee under sub-section (1), apply to the Court for modifying or cancelling such order. Section 34 (2) (*b*) of Act (II of 1927) gave power to the Board to call for any record or proceedings or other document or paper from any committee for the purpose of satisfying itself as to the correctness, regularity or propriety of any order or proceedings recorded or passed by such committee. The Hindu Religious Endowments Board purported to exercise its power under section 34 (2) (*b*) of Act (II of 1927) in that case and took steps for cancelling the lease. At that stage the lessee applied to the High Court for the issue of a writ of *certiorari*. Sir Henry Lionel Leach, C.J., who gave the judgment of the Bench, observed that section 76 must be regarded as an exception to section 34 and that the Board had no jurisdiction to cancel a lease granted under section 76 (1) in exercise of its power of revision under section 34 and the proper way of modifying a legal lease would be to take steps under section 76 (2) by applying to the Court.

But here the situation is entirely different because of certain clearly expressed limitations mentioned in section 101 itself. Section 101 (1) (*b*) comprises of two stages. The first is a stage where the Deputy Commissioner on examining the records is satisfied that a certain property belongs to a religious institution, and issues a certificate to that trustee who finds himself resisted from taking possession of that property. Before the issue of the certificate, the first proviso to section 101 (1) (*b*) authorises the Commissioner to give notice to the parties of his intention to issue the certificate. The second stage is where the trustee who has been granted a certificate applies to the Magistrate for an order delivering possession of the property regarding which a certificate has been given. The second proviso states that for the purpose of proceedings under section 101 (1) (*b*), the issue of the certificate by the Commissioner shall

1. I.L.R. (1940) Mad. 388 : (1940) 1 M.L.J. 28.

be conclusive evidence that the property to which it relates belongs to the religious institution. It is thereafter that the third proviso is found and it states that nothing contained in section 101 (1) (*b*) shall bar the institution of a suit by any person aggrieved by an order under that sub-section for establishing his title to the said property. As mentioned already this section contemplates proceedings which cover two stages. The first stage deals with the issue of a certificate by the Commissioner and the second stage deals with the issue of an order by the Magistrate delivering possession of the property to the person to whom a certificate had been issued. A person may be aggrieved against the order granting a certificate. He may also be aggrieved against the order of the Magistrate directing delivery of possession. But the scope of the suit under the third proviso to that section is not designed for the purpose of cancelling or modifying the certificate of the Commissioner or for cancelling or modifying the order of delivery of possession by the Magistrate. It is really a suit intend ed for establishing the title to the property and such consequences as may flow therefrom. The effect of the third proviso is that the proceedings either for the grant of a certificate or for the grant of delivery of possession will leave intact the title of the person to the property which thus forms the subject matter of a certificate or of an order for delivery of possession, such title can be decided in an independent suit. The remedy by way of a suit thus provided for in the third proviso to section 101, is not intended for setting aside either the certificate granted by the Commissioner or the order for delivery of possession granted by the Magistrate. In this respect section 101 third proviso differs from section 76 (2) of Act II of 1927, where the scope of the suit is concerned directly with the grant of the lease under section 76 (1), and the Court is empowered to modify or cancel the order granting lease, sale, etc. That position, therefore, is quite different from the position visualised in section 101 (1). Under section 76 what is intended is to make a grant of the lease or sale, etc., subject to the decision of a Court, for the purpose of modifying or cancelling the order of lease. But in section 101 the scope of the suit is not directed either to the certificate granted by the Commissioner or to the order directing delivery of possession made by the Magistrate, but relates to the determination of the title of the aggrieved party, which is preserved intact notwithstanding the order as to grant of the certificate or orders as to delivery of possession ; that title can form the subject-matter of a suit notwithstanding orders granting the certificate or order delivering possession. From the above point of view it appears to me that the power of revision conferred in section 21 of the Act on the Commissioner can be exercised where the Deputy Commissioner grants a certificate, because the right of suit in the third proviso is not directed against the proceeding granting certificate, but deals with a different matter, namely, the question of title which is unaffected by the grant of the certificate.

There was a further argument by the learned Counsel for the petitioner that the power of the Deputy Commissioner was exercised by delegation from the Commissioner under section 13, that the power which the Deputy Commissioner thus exercised is really the power of the Commissioner and therefore the Commissioner cannot review the orders of the Deputy Commissioner. I am unable to appreciate the force of this argument. If the Commissioner exercises the power which the statute has conferred on him, clearly he cannot revise his own order under section 21. But where the Deputy Commissioner exercises a power on the strength of a general delegation from the Commissioner, the Commissioner as the supervising authority can rely upon section 21 to correct erroneous or illegal orders passed by the Deputy Commissioner exercising in a specific case powers under a general delegation. I see no legal impediment to the exercise of the power by the Commissioner under section 21 in this case.

The petition therefore fails and is dismissed. There will be no order as to costs.

S.V.J. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. S. KAILASAM.

The Madurai District Co-operative Supply and Marketing Society Ltd., by its Secretary .. *Petitioners**

v.

Kumaravelu Pillai and another .. *Respondents.*

Constitution of India, Article 1950, 226—*Interpretation relating to construction of by-law—Power of High Court to interfere.*

Madras District Co-operative Supply and Marketing Society Limited, By law 15 (9) (*c*)—*'Pay'—Meaning of—Whether includes dearness allowance.*

Words and phrases—' Pay ', ' Wages ', meaning of

Under the Industrial Disputes Act (XIV of 1947) and the Payment of Bonus Act (XXI of1965) the term ' wages ' by virtue of the definition includes ' dearness allowance'. So far as the Fundamental Rules are concerned, the word ' pay' is used as distinct from other allowances. As the extended meaning of the word ' wages ' is given by the inclusive definition, normally the term ' wages' cannot be construed as including 'dearness allowance' also. The word ' pay' can only be construed as distinct from the allowance, on a consideration of the various enactments and rules in which the terms 'pay' and 'allowance' are used, it was held that the word 'pay' in the by-law, can only mean the basic pay without including the ' dearness allowance'.

Interpretation relating to the Constitution of a bye-law is one of law, and it is for the Court to arrive at a proper meaning of the bye-law, and therefore the High Court can interfere under Article 226 of the Constitution of India.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records from the Presiding Officer, Labour Court, Madurai in Claim Petition No. 177 of 1966 dated 16—7—1966 and to quash the same.

S. Chellaswamy and *A. Shanmugham*, for Petitioners.

N. K. R. Prasad for *Row* and *Reddy*, for 1st Respondent.

The Court made the following

ORDER.—This is a petition filed by the Madurai District Co-operative Supply and Marketing Society Limited for the issue of a writ of *certiorari* to call for the records in Claim Petition No. 177 of 1966 on the file of the Presiding Officer, Labour Court, Madurai, and to quash the order dated 16th July, 1966 and made therein.

The first respondent was working as a senior salesman in the above Society at Madurai. He retired from service on 18th February, 1965, as he had attained the age of superannuation. On 22nd March, 1965, he applied to the Society for gratuity pay and for refund of the security deposit of Rs. 250. The Society paid the first respondent 15 months' basic pay on 20th January, 1966. The first respondent again applied on 29th January, 1966 for the grant of dearness allowance. On 2nd February, 1966, the Society rejected the claim of the first respondent for dearness allowance. The first respondent, thereafter, filed a petition under section 33 (C) (2) of the Industrial Disputes Act, before the Presiding Officer, Labour Court, Madurai for dearness allowance and for certain other claims. In that petition, the first respondent claimed 15 months' pay including dearness allowance ; as, according to him, pay would include dearness allowance also. It is unnecessary to refer to the other claims, because they are not in dispute in this writ petition. The Labour

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*W.P. No. 2383 of 1966. 20th December, 1967.

Court held that the first respondent was entitled to 15 months' dearness allowance towards gratuity payable to him.

According to the petitioner, pay would mean only the basic pay and not the dearness allowance, and, as the Society had already paid 15 months' basic pay, the further claim of the first respondent was not maintainable. The only question, therefore, for consideration in this writ petition is whether the first respondent is entitled to 15 months' pay including dearness allowance.

Bye-law 15 (9) (*c*) of the Bye-law of the Madurai District Co-operative Supply and Marketing Society Limited provides that the maximum amount payable to any employee shall not exceed 15 months' pay under any circumstances. The note explaining the term ' pay' provides that pay means the average monthly salary drawn during the last year of the employee's service. But as to whether 'pay' includes dearness allowance or not, the note is not clear. The question will, therefore, have to be decided on a reference to the meanings commonly attributed to the terms ' pay ' and 'dearness allowance'. The word 'pay' in respect of Government servants is understood as distinct from other allowances. Fundamental Rule 9 (21) defines 'pay' as the amount drawn monthly by a Government servant as (i) the pay, other than special pay or pay granted in view of his personal qualifications, (ii) special pay and personal pay, and (iii) any other emoluments which may be specially classed as pay by Government. Fundamental Rule 9 (5) defines ' compensatory allowance' as an allowance granted to meet personal expenditure necessitated by the special circumsstance in which duty is performed and it includes travelling allowance. Thus, so far as the Fundamental Rules are concerned, the word ' pay' is used as distinct from allowances.

In the Industrial Disputes Act, 'wages' is defined in section 2 (*rr*) as meaning all remuneration payable to a workman in respect of his employment, including such allowances as dearness allowance, etc. 'Wages' is defined in the Concise Oxford Dictionary as an amount paid periodically, especially by the day or week or month, for time during which workman or servant is at employer's disposal. The allowance such as dearness allowance is brought within the term of wages by the inclusive definition in the Industrial Disputes Act. So also, the term 'average pay' in section 2 (*aaa*) is defined as including the average of the wages payable to a workman, which would, by virtue of the definition, include dearness allowance. The word ' salary' is defined in the Concise Oxford Dictionary as fixed periodical payment made to person doing other than manual or mechanical work. The payment towards manual or mechanical work is referred to as wages. The word 'pay' refers to the payment for services done which would include his salary as well as wages. In the Payment of Bonus Act, 1965, ' salary or wage' is defined in section 2 (21) as meaning all remuneration including dearness allowance. It will be thus seen that under the Industrial Disputes Act and the Payment of Bonus Act, the term 'wages' by virtue of the definition includes dearness allowance. So far as the Fundamental Rules are concerned, the word 'pay' is used as distinct from other allowances. As the extended meaning of the word 'wages' is given by the inclusive definition, normally the term ' wages ' cannot be construed as including dearness allowance also. The word 'pay' can only be construed as distinct from the allowances, and so construed, the first respondent will only be entitled to 15 months' basic pay without taking into account the dearness allowance.

Mr. Chellaswamy, learned Counsel for the petitioner, referred to a decision of the Supreme Court in *British Paints (India) Ltd.* v. *Its Workmen*[1], where the Supreme Court held that, in calculating the gratuity, only the basic wages should be taken into account excluding dearness allowance. In *Hindustan Antibiotics, Ltd.* v. *Their Workmen*[2], the Supreme Court has ruled in the particular case before it that dearness allowance may be included in 'pay' for the purpose of arriving at the gratuity paya-

1. (1966) 1 L.L.J. 407 : (1967) 1 S.C.J. 789 : (1966) 2 S.C.R. 523.
2. (1967) 1 L.L.J. 114 : (1968) 1 S.C.J. 12.

ble. It held that a decision in the question will depend upon the nature of industry, whether it is a flourishing one and has the capacity to pay, and will depend upon the facts and circumstances of the case.

It was submitted on behalf of the first respondent that, when the Labour Court had construed the by-law in question in a particular manner, this Court should not interfere unless it was perverse and that when two constructions are open, the one given by the Labour Court should not be interfered with. The learned Counsel referred to the decision of the Supreme Court in *Agnani* v. *Badri Das & others*[1], wherein the Supreme Court held at P. 689:

> "......if the tribunal put one interpretation upon the resolution and the High Court thought it better to put another, that cannot be said to introduce an er ror apparent on the face of the record in the order of the tribunal."

In that case, a resolution was passed appointing a committee for enquiring into certain charges. The resolution was interpreted in one way by the Tribunal and in a different way by the High Court. In this case, the interpretation relates to the construction of a by-law, and as the matter is one of law, it is for the Court to arrive at a proper meaning of the by-law. On a consideration of the various enactments and rules in which the terms 'pay' and 'allowance' are used I have no hesitation in holding that on a proper construction of the word 'pay' in the by-law, it can only mean the basic pay without including the dearness allowance.

For the reasons stated, the order of the Labour Court cannot be sustained. The writ petition is allowed. There will be no order as to costs.

S.V.J. — *Petition allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Chief Justice*, MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE M. NATESAN.

The Chief Controlling Revenue Authority, Madras ... *Applicant**

v.

Messrs. V. Ramakrishna Sons (P.) Ltd., Madras, and another... *Respondents.*

Stamp Act (II of 1899), *section* 23-*A and Article* 6 (2) *and Article* 5 (c) *of Schedule I—Construction of the instrument—Shares in public limited companies deposited as security for the amount due—Instrument, if chargeable as an agreement relating to pledge of moveable property or as agreement under Article* 5 (c).

On the question whether the instrument in question (in pursuance of which the executants deposited with the Bank certain shares in public limited companies, as security for repayment of the amount due and payable on overdraft accounts) is chargeable as an agreement relating to pledge or pawn of moveable property falling under Article 6 (2) of Schedule or as an agreement falling under Article 5 (*c*) of Schedule I of the Indian Stamp Act, 1899.

Held that the marketable securities having been deposited on the occasion of the execution of the instrument by way of security for money advanced or to be advanced as required by the provisions of section 23-A of the Stamp Act, the instrument is one falling under Article 5 (*c*) of Schedule I.

Case referred to the High Court by the Chief Controlling revenue Authrority, Madras, under section 57 of the Indian Stamp Act of 1899.

The Additional Government Pleader, for Applicant.

V. Devarajan, for Respondents.

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1. (1963) 1 L.L.J. 684.

*R. C. Nos. 7 and 8 of 1965 — 3rd April 1967.

The Order of the Court was made by

Natesan, J.—These references under section 57 of the Indian Stamp Act, 1899, raise a common question whether the related instrument is chargeable as an agreement relating to pledge or pawn of moveable property falling under Article 6 (2) of Schedule (formerly Article 5 of Schedule I-A) or as an agreement falling under Article 5 (*c*) (formerly Article 4 of Schedule I-A). The language of the two instruments is identical and the same as in R.C. No. 1 of 1964, which this Court had to consider and the answer to which is reported in *The Chief Controlling Revenue Authority, Madras* v. *Sundaram Finance (P.), Ltd., Madras*[1]. Under the instruments in question, the executants arranged with the Bank for the cash credit or overdraft facilities providing security for the advances. The relevant term of the instrument, which is relied upon for the Revenue is clause 11 which runs thus :

"That the borrowers do further agree and hereby give to the said Bank during the currency and for the payment of its dues, a general lien and right of set off and charge on all moveable property of every description coming into the possession of the said Bank on account of the borrowers or any one of them, or for the time being held by the said Bank on behalf of the borrowers or any one of them, whether alone or jointly with others..........without prejudice to this generality any moneys, bullion, deposits, deposit receipts for moneys, promissory notes.... stocks, goods and merchandise........any other negotiable or transferable instruments or securities, instruments and documents of title and mercantile documents of every description including hire purchase agreement or contracts other than those affecting immoveable property........"

In the case in R.C. No. 7 of 1965 the overdraft facility is to the limit of Rs. 4,50,000 and in the other case R.C. No. 8 of 1965 the provisions is for overdaraft facility to the extent of Rs. 3 lakhs. Now for an instrument to amount the pledge or pawn falling under Article 6 (2), there must be a present transfer of possession of moveable property. This problem arose for consideration in R.C. No. 1 of 1964 above referred to. The Special Bench had no difficulty in holding on the terms of the instrument that it would create a pawn or pledge of moveable property, provided the bank had possession of moveable property, falling under the terms of the instrument when the instrument was executed. In that case an affidavit was called for and the affidavit filed indicated that the Bank had possessin of certain hire purchase agreements which formed security for the amounts advanced and to be advanced. That Special Bench therefore held that the case fell squarely within the language of Article 6 of Schedule I, the agreement clearly evidencing pledge or pawn of moveable property. In the present case, an affidavit has been filed by the accountant of the Punjab National Bank Ltd., stating that as security for repayment of the amount due and payable pursuant to the instruments under consideration on overdraft accounts, the executants had deposited with the Bank certain shares in public limited companies. The shares are specified in the affidavit. It is on this deposit counsel for the Revenue would contend that in accordance with the decision in R.C. No. 1 of 1964, we must hold that the instruments fall under Article 6 (2) of the Stamp Act. The learned Counsel appearing for the executants draws our attention to section 23-A of the Stamp Act, the relevant portion of which runs thus :

"Where an instrument (not being a promissory note or bill of exchange)—(*a*) given upon the occasion of the deposit of any marketable security by way of security for money advanced or to be advanced by way of loan, or for an existing or future debt, or (*b*) makes redeemable or qualifies a duly stamped transfer, intended as a security, or any marketable security, it shall be chargeable with duty as if it were an agreement or memorandum of an agreement chargeable with duty under Article 5 (*c*) of Schedule 1........"

Learned Counsel submits that section 23-A has an overriding effect and, as in the present case, marketable securities only had been deposited on the occasion of

1. I.L.R. (1966) 1 Mad. 570 : (1966) 1 M.L.J. 6 : 79 L.W. 1 (F.B.).

the execution of the instrument by way of security for money advanced or to be a advanced, the instrument is one falling under Article 5 (*c*) of Schedule I. The language of Article 23-A is emphatic and it cannot be denied that the documents deposited on the occasion are marketable securities. In the circumstance, our answer has to be that the instruments will not fall under Article 6 (2) of the Stamp Act as relating to pawn or pledge, but are instruments falling under Article 5 (c) of the Stamp Act. The references are answered accordingly. No order as to costs.

V.M.K. ——— *Reference answered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE T. VENKATADRI.

K. M. Rajaram .. *Petitioner**

v.

Chinnathurai and another .. *Respondents.*

Madras Panchayats Act (XXXV of 1958), *section* 25 (2) (*c*)—*Disqualification under*—*Lessee of coconut* thope *belonging to panchayat*—*If disqualified for election to the Panchayat.*

A person will not be disqualified under section 25 (2) (*c*), for election as a member of a Panchyat, on the ground that he was a lessee of a coconut *thope* belonging to the Panchayat, on the date of his nomination. Once a lease had been executed and the lessee had taken possession of the leased property, nothing remains to be done by the lessee to the panchayat and he is only required to enjoy the usufruct during the period of the lease.

Case law discussed.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in O.P. No. 7 of 1965 on the file of the 2nd respondent herein and quash the order made therein dated 27th August, 1965.

P. R. Gokulakrishnan, for Petitioner.

G. Ramaswami for 1st Respondent.

The Court made the following

ORDER.—An interesting question of law arises in this writ petition, *viz.*, whether a person can be disqualified for election as a member of a Panchayat, on the ground that he was a lessee of a coconut *thope* belonging to the Panchayat, on the date of the nomination.

The writ petitioner had taken out a lease of coconut *thope* belonging to the Panchayat. In the election to the Perambur Panchayat, Mayuram Taluk, held on 30th January, 1965, the petitioner was declared elected. The first respondent filed an election petition against the petitioner, for a declaration that the election was void, as the petitioner had an interest in a subsisting contract with the Panchayat Board on the date of nomination, and he was therefore disqualified to be a member of the Panchayat.

As per the provisions of the Panchayat Act, a person is disqualified for election as a member, if, at the date of nomination or election, he is interested in a subsisting contract made with or any work being done for, any panchayat. In the instant case, it is common ground that the petitioner was the highest bidder at the auction for the sale of the lease of the property on 30th April, 1964. The property owned by the Panchayat comprises of 10 coconut trees and 6 lime trees. It is the case of the petitioner that on the date of nomination he had surrendered the lease, but the Election Commissioner of Panchayats (District Munsif), Mayuram, did not believe

*W.P. No. 3765 of 1965. 27th April, 1967.

this case of the petitioner. He found that there was a subsisting contract in respect of the *thope* at the date of nomination, and that the petitioner was, therefore, disqualified under section 25 (2) (*c*) of the Panchayat, Act, 1958, for election as a member of the Panchayat.

The only question for consideration in this writ petition is whether the petitioner can be disqualified, merely by reason of the fact that he had taken out a lease of the *thope* belonging to the Panchayat.

Learned Counsel for the petitioner contends that, once a lease had been executed and the lessee had taken possession of the leased property, nothing remains to be done by the petitioner except to enjoy the usufruct during the period of the lease. The petitioner's Counsel, therefore, submits that it cannot be said that there is a subsisting contract.

Before the present Act was enacted, under the provisions of the old Act, there was a notification issued by the Government which stated that no person should be disqualified for election as a member of a Panchayat on the ground that at the date of nomination or election, he was interested in a subsisting contract made with, or any work being done for, the Panchayats, and no member should cease to hold office as such on the ground that he acquired any interest in any such contract. But under the provisions of the present Act, a member shall cease to hold office as such if he acquires any interest in any subsisting contract with, or work being done for, the Panchayat. In this case, can it be said that the petitioner is interested in a subsisting contract made with, or any work being done for, the Panchayat?

Learned Counsel has cited *K. S. Sharma* v. *Ramgulam*[1], a case on identical facts, wherein the question for consideration was whether a contract of lease with municipal committees would be a disqualification under clause (1) of section 15 of C. P. and Berar Municipalities Act, which says that no person shall be eligible for election, selection or nomination as a member of a committee if such person has directly or indirectly any interest in any contract with, by or on behalf of the committee, while owning such share or interest. A Division Bench of the Nagpur High Court has held in that case, that, where a contract is completely executed by both the parties and nothing remains to be done by either side, the contract is wholly exhausted and ceases to have any effect. In *Bholanath* v. *Krishna Chandra Gupte*[2] the Election Tribunal has held that a person to whom the Collector has leased out land under section 4 of the U.P. Land Utilisation Act, 1948, is not disqualified under section 7 (*d*) of the Representation of the People Act, 1951, as the transaction is not a contract, express or implied, between the lessee and the State Government, for the supply of goods, to, or the performance of any services undertaken by, the State Government. In *Lumba Ram* v. *Ram Narain*[3], the Director of the Department of Mines and Geology of State granted to the petitioner the sole right to quarry building stone from the various quarries of the State under a contract which contained a stipulation that the petitioner agreed to submit to the excavation and removal of all stone required for the State Railway and Military Works and also to allow the P.W.D. contractors to excavate and remove all stone required for Government works on payment of a fixed royalty. The Election Tribunal held that the contract was not one for the supply of goods to the Government within the meaning of section 7 (*d*) of the Representation of the People Act, as there was no agreement to supply goods but only to allow the removal of stone required for Government pruposes. In *R. Deshpande* v. *Muttam Reddy*[4], it was alleged that the first respondent therein was a beedi-leaf contractor of the Government for some named villages which contract was subsisting at the time the nomination papers were filed, and therefore his election should be set aside. The question for consideration was whether the terms of the contract deemed it a contract for the supply of goods or the execution

1. A.I.R. 1954 Nag. 255.
2. 6 E.L.R. 104.
3. 5 E.L.R. 319.
4. A.I.R. 1961 A.P. 180.

of any works or the performance of any services undertaken by the appropriate Government. The Bench observed that the nature of the Beedi-leaves contract was such that no supply of goods or execution of any works to or for the Government was envisaged, and that the agreement between the Government and the first respondent as one for sale and purchase of beedi-leaves, pure and simple. In *Dip Narain Singh* v. *Nageshar Prasad*[1], it was held by a Full Bench of the Allahabad High Court that once a document transferring immoveable property had been duly executed and registered, the transaction passed out of the domain of mere contract into one of conveyance, and that such a complete transaction was governed by the provisions of the Transfer of Property Act. The same view was held in the case of lease in *Kandasami Pillai* v. *Ramasami Mannadi*[2], After referring to the above case, it is observed in *K. C. Sharma* v. *Ramgulam*[3], that, although, therefore, in a case of completed lease there is a continuing liability to pay rent, it cannot be referred to the contract after it is executed and that this liability would, after the completion of the lease, be enforceable under section 108-B (1), Transfer of Property Act, and not under the provisions of the Contract Act or Specific Relief Act.

Lastly, In *C. V. K. Rao* v. *D. B. Rao*[4], the Supreme Court held that in the case of a mining lease by Government, where there was a covenant for pre-emption of minerals in favour of Government, the right of pre-emption did not amount to contract for supply of goods which could be said to subsist between the parties. Their Lordships have observed that the disqualification which results from section 7 (*d*) of the Representation of the People Act is conditioned by a number of circumstances, there must be a subsisting contract between the appropriate Government and the candidate, the contract must be in the course of trade or business of the candidate and finally it must be *inter alia* for the supply of goods to such Government. In the present case, the petitioner is not supplying the usufruct to the Panchayat. He cannot be said to supply goods to the Panchayat nor render service to the Panchayat under the alleged contract. It is also useful to refer to the following passage occurring in *Tranton* v. *Astor*[5].

> "I will say at once that I think that the real and sufficient answer to the claim of the plaintiff in this action is that even if Government department acting directly does give an order to a newspaper for the insertion of a Government advertisement in a particular issue of the newspaper, and the newspaper accepts and inserts the advertisement, and that is all, such a transaction is not a contract or agreement within the meaning of this legislation at all, and such casual or transient transactions are not the kind of contracts covered by these statutes, but that what are meant to be covered are contracts of a more permanent or continuing and lasting character, the holding and enjoying of which might improperly influence the action both of legislators and the Government."

Therefore, in the present case, once the petitioner has taken out a lease of the *thope* belonging to the Panchayat and once the lease has been executed, there remains nothing to be done by the petitioner to the Panchayat, and he is only required to enjoy the usufruct of the leasehold property during the period of the lease. And the petitioner is not supplying any goods to the Panchayat. Therefore, on a review of the case-law and upon facts, it appears to me that the conclusion come to by the Election Commissioner is vitiated by an error apparent on the face of the record.

The Writ Petition is allowed but without costs.

V.K. ——— *Petition allowed.*

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1. A.I.R. 1930 All. 1 (F. B.)
2. I.L.R. 42 Mad. 203 : 36 M.L.J. 313 : A.I.R. 1919 Mad. 168.
3. A.I.R. 1954 Nag. 255.
4. (1965) 1 M.L.J. (S.C.) 116 : (1965) 1 An. W.R. (S.C.) 116 : (1965) 1 S.C.J. 614 : A.I.R. 1965 S.C. 93.
5. (1917) 33 T.L.R. 383.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. SRINIVASAN AND MR. JUSTICE R. SADASIVAM.

Madurai Nayagamma and others .. *Petitioners**

v.

Plantain Merchants Association, represented by its Secretary .. *Respondent.*

Madras Buildings (Lease and Rent Control Act) (XVIII of 1960) section 26—Eviction order against—Chief tenant—Sub-tenants such not made parties to eviction petition—Whether order binding on sub-tenants.

Civil Procedure Code (V of 1908), Order 21, Rules 35 and 98—Applicability of, to sub-tenants not made parties to eviction petition.

An order of eviction obtained against the Chief tenant can be executed by evicting the sub-tenants who were not made parties in the Application for eviction.

If the sub-tenants are made parties, the order of eviction would be binding on them of its own force and execution could be levied under Order 21, Rule 35, Civil Procedure Code. But if the sub-tenants are not made parties to the eviction application, they will not be parties to the order and any obstruction for delivery in execution would fall only under Order 21, Rule 98, Civil Procedure Code. The rights of a sub-tenant who has not been made a party, are sufficiently protected by the general provisions contained in Order 21, rules 98 to 103, Civil Procedure Code.

Petition under section 25 (1) (*a*) (i) read with the Proviso to section 18 of Madras Act XVIII of 1960 praying the High Court to revise the order of the Third Assistant Judge of the City Civil Court, Madras, in E. A. No. 990 of 1964 in E. P. No. 456 of 1964—H. R. C. No. 544 of 1964, Rent Controller, Madras.

O. Radhakrishnan, and *C. B. Venkataswami*, for Petitioners.

E. A. Viswanathan, for Respondent.

The Order of the Court was made by

Sadasivam, J.—The question that has been referred to this Bench by Alagiriswami, J., is

"Whether an order of eviction obtained against a chief tenant could be executed by evicting the sub-tenants who were not made parties to the application for eviction."

The petitioners obstructed delivery of possession in the execution application filed by the respondent-landlord, who had obtained an order of eviction against the chief tenant before the Rent Controller in H. R. C. No. 544 of 1964. The petitioners were not made parties to the application for eviction by the respondent-landlord filed under the Madras Buildings (Lease and Rent Control) Act XVIII of 1960, hereinafter called the Act.

The contention of the learned Advocate for the petitioners is based on section 26 of the Act which is as follows :

"Any order for the eviction of a tenant passed under this Act shall be binding on all sub-tenants, who were made parties in the application for eviction but any person who became a sub-tenant after the date of the application for eviction shall be bound by the order of eviction and be evicted as if he were a party to the proceedings, provided that such order was not obtained by fraud or collusion."

The definition of 'tenant' in section 2 (8) of the Act does not take in a sub-tenant. Under section 12-C of the earlier Madras Buildings (Lease and Rent Control) Act XXV of 1949 any order for the eviction of a tenant passed under the Act shall be binding on all sub-tenants under such tenant, whether they were parties to the proceeding or not, provided that such order was not obtained by fraud or collusion.

* C. R. P. No. 204 of 1965. 29th August, 1967.

In his order of reference Alagiriswami, J. has referred to the decisions of this Court which have uniformly held that in spite of the wording of section 26 of the Act, the eviction order could be executed against sub-tenants though not made parties to the eviction application. He has made this reference on the ground that the change in law, effected by section 26 of the Act, has not been fully considered in those decisions. The decisions referred to are those of Ramamurti, J. in *Ramachandra Chetty* v. *Mothaliyandan Chettiar*[1], and *Abdul Jameel* v. *Messrs. Simpson and Machonochy Ltd.*[2], which was not reported at the time of reference.

In the earlier decision, Ramamurti, J. has referred to the decision of the Supreme Court in *Rupchand* v. *Raghanshi (P.) Ltd.*[3]. At page 1892 of the said decision, in paragraph 13, the Supreme Court has pointed out that where the landlord institutes a suit against the lessee for possession of the land on the basis of a valid notice to quit served on the lessee and does not implead the sub-lessee as a party to the suit, the object of the landlord is to eject the sub-lessee from the land in execution of the decree and such an object is quite legitimate, and that the decree in such a suit would bind the sub-lessee. The Supreme Court pointed out that this may act harshly on the sub-lessee but this is a position well understood by him when he took the sub-lease. This is what Ramamurti, J. has referred to in *Ramachandra Chetti* v. *Mothaliyandan Chettiar*[1], as settled law, that, if a decree for eviction is passed against the main tenant, the order of eviction can be straightaway enforced and executed as against the sub-tenant and, pointed out that by enacting section 26 of the Act it was not the intention of the Legislature to make a deliberate departure from this settled and accepted position in law. It is clear from Mulla's Transfer of Property Act, 5th Edition, page 700 that the sub-lessee is not entitled to larger rights than the lessee himself and that there is no privity of estate or contract between him and the landlord of his lessor.

The decision in *Parthasarathi Chetti* v. *Chitra Pillai*[4], though rendered prior to the date of reference has been reported subsequently and this decision deals with the very point which has led to this reference. At page 88 of the decision Natesan, J. has pointed out:

"The object of the particular provision in the old Act and the effect of the variation by the new Act can be appreciated only if the general law in regard to the matter and the processual law relating to execution of the order in question is understood."

Under section 12-C of the Madras Act XXV of 1949 an order for the eviction of a tenant passed under the Act shall be binding on all sub-tenants under such tenant, whether they were parties to the proceeding or not, provided that such order was not obtained by fraud or collusion. But, under section 26 of the Act, only the binding nature of the order of eviction against the sub-tenants who were made parties, was specified, leaving the general law as to the rights and liabilities of the sub-tenants not made parties intact. It is clear from the latter part of section 26 of the Act that persons who became sub-tenants after the date of application for eviction shall be bound by the order of eviction, whether made parties or not. If the sub-tenants are made parties, the order of eviction would be binding on them of its own force and execution could be levied under Order 21, Rule 35, Civil Procedure Code. But if the sub-tenants are not made parties to the eviction application, they will not be parties to the order and any obstruction for delivery in execution would fall only under Order 21, rule 98, Civil Procedure Code. Natesan, J. has pointed out, at page 88 of the decision in *Parthasarathi Chetti* v. *Chitra Pillai*[4], that in such circumstances the provisions of Order 21, Rule 97, Civil Procedure Code, have to be availed of by the decree-holder and if the Court is satisfied that the objection was wanton and made without just cause, the obstruction could be directed to be removed and the decree-holder placed in possession, dispossessing the sub-

1. (1965) 2 M.L.J. 265 : 78 L.W. 489.
2. (1967) 1 M.L.J. 337.
3. (1965) 2 S.C.J. 584 : A.I.R. 1964 S.C. 1889.
4. (1967) 1 M.L.J. 83.

tenant. The sub-tenant, who is not made a party may set up independent right to continue in possession of the demised premises. Thus, as pointed out by Natesan, J., a sub-tenant who was not made a party to the eviction application may set up his own title or he may plead a direct tenancy, apart from contending that the eviction order had been obtained fraudulently and in collusion. The rights of a sub-tenant, who has not been made a party, are sufficiently protected by the general provisions contained in Order 21, rules 98 to 103, Civil Procedure Code.

We, therefore, answer the question in the affirmative, that is to say, that the order of eviction obtained against the chief tenant can be executed by evicting the sub-tenants who were not made parties in the application for eviction.

[The petition then came up for final hearing before Alagiriswami, J.]

The Court made the following

ORDER†.—The only question in the Civil Revision Petition is whether an order for eviction obtained against the chief tenant is binding on the sub-tenants also, even though they might not have been added as parties to the proceedings. The matter was before a Bench and it has since decided that it is binding on the sub-tenants. There is no other question in the Civil Revision Petition and it is accordingly dismissed with costs. The petitioners will have a period of three months to vacate.

S.V.J. — *Answered in the affirmative.*
Revision dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Chief Justice.*

N. Bhaktavatsalu Chetty and others .. *Petitioners**

v.

M. Natesa Achari (decd.) and others .. *Respondents.*

Madras Buildings (Lease and Rent Control Act (XVIII of 1960), *section* 10 (3) (*b*)—*Interpretation—Landlord trust seeking to evict tenant for using the building as a Kalyanamantapam so as to increase its income—If justified under section* 10 (3) (*b*) *of the Act.*

On the question whether the landlord trust is entitled to evict the tenants, so that the building can be used as a Kalyanamantapam, in which contingency, the Trust expects that a much higher income will be derived, *held that* the expression "if the building is required for purposes of the institution" in section 10 (3) (*b*) of Madras Act (XVIII of 1960), cannot be so interpreted as to defeat the very object of the statute, which is one primarily intended for the protection of tenants from "unjust" or "undue" eviction, and thus read, unless one of the objects of trust is the celebration of marriages in a Mantapam, the tenants occupying certain residential premises belonging to the trust cannot be evicted under section 10 (3) (*b*) of the Act.

Petition under section 25 of Act XVIII of 1960 praying the High Court to revise the order of the Small Cause Court, Madras, in H.R.A. No. 661 of 1964 in H.R.C. No. 2552 of 1963.

P. Raghaviah, for Petitioners.

V.N. Srinivasa Rao and *C.S. Rajappa,* for Respondents.

The Court delivered the following

JUDGMENT.—Under the circumstances of this revision proceeding by the tenants of certain premises, it appears to me to be clear that the petition will have to be allowed. The facts are not in dispute, that the landlord is the Rajachar Ammakanna Ammal Trust, a religious and charitable endowment represented by the trustees. The revision petitioners are the tenants of certain residential premises.

† 4th October, 1967. 8th September, 1967.

* C.R.P. No. 1024 of 1965 and C.M.P. No. 10533 of 1967.

Briefly stated, the landlord claims the right to evict these tenants under section 10 (3) (*b*) of Madras Act XVIII of 1960, which is in the following terms :

"Where the landlord of a building, whether residential or non-residential, is a religious, charitable, educational or other public institution; it may, if the building is required for the purpose of the institution, apply to the Controller.... for an order directing the tenant to put the institution in possession of the building."

At first, I was inclined to the view that the effective words of this sub-section, namely, "if the building is required for purposes of the institution" may have to be interpreted in a wide, rather than in a restricted sense. But, obviously, these words cannot be so interpreted as to defeat the very object of the statute, which is one primarily intended for the protection of tenants from "unjust" or "undue" eviction. In the present case, the tenants (revision petitioners) are in occupation of certain residential premises belonging to the trust, and it is not pleaded that they committed default in the payment of rent, or gave cause for any other ground for eviction, which is available to the landlord trust under the statute. Nor is this a case where the landlord trust is attempting to avail itself of section 14 (1) (*b*) of the Act, requiring the building for the purpose of immediate demolition and reconstruction.

Simply stated, this is a case in which the landlord trust is seeking to evict the tenants, so that the building can be used as a Kalyanamantapam, in which contingency, the trust expects that a much higher income will be derived. It seems by me that the argument is clearly fallacious, that the eviction of a tenant from a residential building belonging to the trust, in order to get more money by releasing the property to some other person for a limited purpose, can be one of the valid purposes of the trust, on the logic that the trust has to subsist on its revenues. If that argument is accepted, every trust will be automatically entitled to evict all or any of its tenants at pleasure, wholly disregarding the protection offered to tenants under the various provisions of Madras Act XVIII of 1960. The argument is certainly sustainable if the celebration of marriages in a Mantapam, is one of the objects for which the trust was founded. But that is not the case. Nor does the Trust require the building for its own use. The trust appears to be merely clutching at possession of the building, by evicting the present tenants, so that a higher income can be derived, irrespective of the fair rent which might be fixed for the premises under the Act.

I find that a very similar case came up before Veeraswami, J. in *Official Trustee of Madras* v. *M/s. Gopalji Champshi & Co.*,[1] which is briefly reported. I have also obtained and perused the full text of the judgment. There were other facts involved in that case, not germane to the present proceeding, since the Official Trustee was the applicant there, and he did not fulfil the criterion of being a religious, charitable, educational or public institution under section 10 (3) (*b*) of the Act. But this apart, the learned Judge has explicitly observed that the Trust must require possession of the building "for its own purpose." Curiously, that was also a case in which an attempt was made to convert the premises as a Kalyanamandapam.

Under the circumstances, it follows that in this case also, section 10 (3) (*b*) of the Act is not attracted to the facts of the case. Admittedly there is no other provision upon which the revision petitioners (tenants) can be now evicted. I am leaving open the question of the determination of fair rent for this premises, if the contention of the trust is correct, that the premises have been leased for very much below the true rental value. The revision is allowed accordingly and the order of eviction of the Court below is set aside. No order as to costs. The C.M.P. No. 10533 of 1967 is allowed.

V. M. K. ——— *Revision allowed.*

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1. (1967) 1 M.L.J. 45 (N.R.C.) : 80 L.W. (Short Notes) 17.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. VENKATARAMAN.

C. D. Dhanaraj and another .. *Petitioners**

v.

S. Nami Stella Sarojini and others .. *Respondents.*

Civil Procedure Code (V of 1908), *section* 115—*Interpretation—Meaning of 'material irregularity'—Error of procedure in the course of the trial which is material and which may have affected the ultimate decision—Failure of the Subordinate Court to exercise a jurisdiction vested in it—Effect—Additional written statement to be received.*

Section 115 of Civil Procedure Code (V of 1908), *inter alia* provide d that the High Court may call for the records of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto and is such subordinate Court appears (*a*) to have exercised a jurisdiction not vested in it by law, or (*b*) to have failed to exercise a jurisdiction so vested or (*c*) to have acted in the exercise of its jurisdiction illegally or with material irregularity.

The expression "material irregularity" in clause (*c*) should be construed as committing some *error of procedure* in the course of the trial which is material in that it may have affected the ultimate decision. Thus, so long as the Subordinate Court has jurisdiction to decide the question the mere fact that the Court decided the case wrongly either in law on in fact, will not itself amount to acting illegally or with material irregularity.

The learned Subordinate Judge in this case has not acted illegally or with material irregularity, but has failed to exercise a jurisdiction vested in him. Therefore on facts, it has to be held that the additional written statement should be received, but omitting the last portion of paragraph 2 thereof and paragraph 5 thereof.

Petitions under section 115 of Act V of 1908, praying the High Court to revise the order of the Sub-Court, Tuticorin, in I.A. No.180 etc. of 1966 in O.S.No. 163 of 1963.

J.S. Vedamanickam, for Petitioners.

K. Gopalachari and *T. Krishnan,* for Respondents.

The Court delivered the following

JUDGMENT.—The revision petitions are connected and hence they are being disposed of together. The petitioners are the defendants in the suit O.S.No. 16 of 1963 on the file of the Subordinate Judge's Court, Tuticorin. The suit was filed by the four plaintiffs claiming an one-fourth share of the properties listed out in the four schedules to the plaint. The parties are Christians governed by the Indian Succession Act, 1925. The plaintiffs alleged that the properties belonged to their materna-grandfather, Gnana Doraiswami Nadar, who died intestate on 9th March, 1955. Their mother's mother Ratnamani Sellammal was the first wife of Gnana Doraiswami Nadar. The three defendants are the sons of Gnana Doraiswami Nadar by his second wife Gnana Siromani Ammal. Ratnamani Sellammal, the first wife died during the lifetime of Gnana Doraiswami Nadar and the second wife died shortly after his death in November, 1955. The heading of the properties in schedule II was 'Properties of Gnana Doraiswami Nadar in the name of Gnana Siromani Ammal'. The plaint further alleged in para. 6, that, besides the properties mentioned in the four schedules, Gnana Doraiswami Nadar owed other properties which the defendants "have to be directed to disclose."

The first defendant filed a written statement which was adopted by defendants 2 and 3. Their main defence was that the plaintiff's grandmother had received some properties from Gnana Doraiswami Nadar in full settlement of her claims,

* C. R. P. Nos. 1916 of 1966 and 383 of 1967. 27th September, 1967.

that consequently the plaintiffs were not entitled to any share and that their share, if any, could only be the one-sixth. We are not now concerned with these defences. We are now only concerned with the answer to paragraph 6 of the plaint which is contained in paragraphs 4 and 12 of the written statement. In paragraph 4 the defendants stated that the third schedule properties were the exclusive properties of the mother of the defendant, Gnana Siromani Ammal, and that the plaintiffs were not entitled to any share in them. In paragraph 12 it was stated :

"There are no other properties belonging to the family except whatever is set forth in the schedules I, II and IV, schedule III being properties which belong to the mother of the defendants in her own right."

Thus the definite admission of the defendants was that the properties set forth in schedules I, II and IV belonged to Gnana Doraiswami Nadar. But, after several adjournments, they filed the two applications out of which these revisions arise (I.A. Nos. 180 and 181 of 1966) to amend the written statement and to receive an additional written statement. The affidavits filed in support of the applications are to the effect that they were all employed in Government service in distant places and had no real knowledge of the relevant documents and papers relating to the properties. They were under the impression that the plaintiff's claim was untenable and that the plaintiffs would compromise the suit and that is why they did not take much care in filing the original written statement. But, when they realised that they had to go to trial, they searched the papers again in order to prove their title to the third schedule properties, and in the course of such search they found certain documents mixed up with old papers showing that not only the properties listed in the third schedule, but certain other items also, not belonging to Gnana Doraiswami Nadar had been included in the plaint as belonging to Gnana Doraiswami Nadar. In particular, item No. 2 of plaint first schedule, and items 1 and 2 of plaint fourth schedule also belonged to the defendant's mother Gnana Siromani Ammal. She had purchased them with her own moneys, paid tax and enjoyed them during her lifetime, and they were subsequently enjoyed by the defendants as their mother's properties. The particulars are to be found in paragraph 4 of the additional written statement sought to be filed.

It was then alleged in paragraph 5 of the additional written statement:

"Further in item No. 18 of Schedule II, extent is 10 cents belongs to this defendant (2nd defendant) he having purchased it with his earnings. As such the plaintiffs cannot claim any share in this item."

The extent given in the plaint schedule for this item is 67 cents.

The prayer in I.A. No. 180 of 1966 was to delete from paragraph 12 of the written statement the words "except whatever is set forth in schedules I, II and IV, schedule III being properties which belonged to the mother of the defendants in her own right." The prayer in I.A. No. 181 of 1966 was to receive the additional written statement.

These applications were opposed by the plaintiffs. The learned Subordinate Judge by a common order dated 11th August, 1966 dismissed both the applications. After quoting Order 6, rules 7 and 17, Civil Procedure Code, he observed :

"Apart from the question of enormous delay on which ground alone it cannot be said that the petitions could be dismissed, it is evident that the proposed amendments of the written statement of the first defendant and the additional written statement sought to be filed go back upon the admitted position that the properties described in the Schedules I, II and IV belonged to the family and hence were liable for partition. A new case is thereby sprung upon the plaintiffs, for the first time and there is nothing to show that the facts set up were not within the knowledge of the defendants or could not have been ascertained by them earlier. So the Court will be justified in rejecting these petitions."

C.R.P. No. 1916 has been filed in respect of I.A. No. 180 of 1966 and C.R.P. No. 383 of 1967 has been filed in respect of I.A. No. 181 of 1966.

In my opinion, the learned Subordinate Judge did not sufficiently appreciate the circumstances set out in the affidavits of the defendants, nor am I sure that he kept in view the principles bearing on the question of allowing amendments. The result was that he failed to exercise the jurisdiction vested in him to permit the amendments and did not proceed to consider the further question as to how far the amendments could be allowed. Under these circumstances, it is the duty of this Court to interfere in revision under section 115 (*b*), Civil Procedure Code.

In *Subramania Iyer* v. *Hitchock*[1], a Bench decision of this Court, there is a detailed discussion of the principles which should govern the disposal of an application for amendment of a written statement raising a plea inconsistent with an earlier admission in the original written statement. It is pointed out that the earlier admission might have been made by mistake and that in such case the Court should be liberal in allowing the amendment. But, where there is reason to think that the earlier admission might have been made by mistake and that in such case the Court should be liberal in allowing the amendment. But, where there is reason to think that the earlier admission was not made by mistake and that the defendant deliberately changes his mind later, he should not be allowed to amend. *Dharmalinga Chetti* v. *Krishnaswami Chetti*[2], *Md. Ibrahim Maricar* v. *Ahmed Maricar*[3], *Muthusami Raja* v. *Ramu Ammal*[4], are cases in which amendments inconsistent with previous admissions were allowed.

So far as the facts in this case are concerned, there is nothing inherently improbable in the circumstances alleged in the affidavits of the defendants, so far as the properties, which are set forth as belonging to Gnana Siromani Ammal in addition to the third schedule properties are concerned. It must be remembered that, after all, we are only at the stage of permitting an amendment, and still at the trial the defendants will have to substantiate their claim and naturally they would be asked at the trial to explain their earlier admission. But the amendment regarding item 18 of Schedule II stands on a different footing. If, as is now alleged, the second defendant had purchased a portion of the ten cents with his earnings, it is a fact which he could not have forgotten when he filed the original written statement. Accordingly that amendment cannot be permitted.

There is also another point that, except in respect of the plaint first schedule, item 2, second schedule, item 2, fourth schedule, items 1 and 2 and the third schedule which are said to belong to the defendant's mother, Gnana Siromani Ammal, the defendants must be pinned down to their admissions in the original written statement that the other properties belonged to Gnana Doraiswami Nadar. I mention this, because in paragraph 2 of the additional written statement there is an attempt to put the plaintiffs to proof of the title of Gnana Doraiswami Nadar in respect of each and every item of the plaint schedule properties. That attempt cannot be permitted. Paragraph 2 of the additional written statement runs thus:

> "The averments in para. 6 of the plaint are incorrect and made by the plaintiff without regard for truth and facts. The defendants do not admit that the entire plaint schedule mentioned properties belonged to G. D. Nadar and plaintiffs are put to strict proof that G. D. Nadar had absolute right over each and every item of the plaint schedule properties and to prove the correctness of the extent."

The portion "the plaintiffs are put to strict proof that G. D. Nadar had absolute right over each and every item of plaint schedule properties and to prove the correctness of the extent" must be deleted.

In *Dharmalinga Chetti* v. *Krishnaswami Chetti*[2] Panchapakesa Aiyar, J. interfered under section 115 (*b*), Civil Procedure Code. But in *Muthuswami Raja* v. *Ramu Ammal*[4], Subramaniam, J., interfered under section 115 (*c*) on the ground that the learned Subordinate Judge had acted with material irregularity in the exercise of his jurisdiction in refusing to allow the amendment prayed for. In *Md. Ibrahim*

1. (1925) 22 L.W. 26 : A.I.R. 1925 Mad. 950.
2. (1948) 2 M.L.J. 644: A.I.R. 1949 Mad. 467.
3. (1948) 2 M.L.J. 576: 61 L.W. 836: A.I.R. 1949 Mad. 541.
4. (1958) 1 M.L.J. 302 : A.I.R. 1958 Mad. 461.

Maricar v. *Ahmed Maricar*[1], (a decision of Rajagopalan, J.) it is not stated whether clause (*b*) or clause (*c*) was applied. It seems to me that in this state of the rulings it is desirable for me to give my reasons for holding that a case like the present case comes under clause (*b*) and not under clause (*c*) of section 115. Section 115, Civil Procedure Code, runs:

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto and if such subordinate Court appears (*a*) to have exercised a jurisdiction not vested in it by law, or (*b*) to have failed to exercise a jurisdiction so vested or (*c*) to have acted in the exercise of its jurisdiction illegally or with material irregularity."

There are numerous decisions on the question, as can be gathered from the Commentaries of Mulla and the A.I.R., but it is sufficient to mention the following decisions of the Privy Council and the Supreme Court. *Raja Amir Hasan Khan* v. *Sheo Bags Singh*[2], *Balakrishna Udayar* v. *Vasudeva Aiyar*[3], *Venkatagiri Aiyangar* v. *Hindu Religious Endowments Board, Madras*[4], *Jaychand Lal Babu* v. *Kamalaksha Choudry*[5], *Kocharde Chamria* v. *Radhakissen Chamria*[6], and also *Chellammal Anni* v. *Masanan Samban*[7].

In the two decisions first mentioned their Lordships point out that, so long as the Subordinate Court has jurisdiction to decide the question the mere fact that the Court decided the case wrongly either in law or in fact, will not by itself amount to acting illegally or with material irregularity. In *Venkatagiri Aiyangar* v. *Hindu Religious Endowments Board, Madras*[4], their Lordships observed :

"Section 115 applies only to cases in which no appeal lies, and where the Legislature has provided no right of appeal, the manifest intention is that the order of the Court, right or wrong, shall be final. The section empowers the High Court to satisfy itself upon three matters (*a*) that the order of the Subordinate Court is within its jurisdiction (*b*) that the case is one in which the Court ought to exercise jurisdiction (*c*) that in exercising jurisdiction the Court has not acted illegally, that is, in breach of some provisions of law, or with material irregularity, that is, by *committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision* : If the High Court is satisfied upon these three matters, it has power to interfere, because it differs, however, profoundly, from the conclusions of the Subordinate Court upon questions of fact or law." (The italics is mine).

It will be seen that their Lordships construe material irregularity as committing some *error of procedure* in the course of the trial which is material in that it may have affected the ultimate decision.

In *Jay Chand Lal Babu* v. *Kamalaksha Chaudry*[5], their Lordships point out that though a Subordinate Court might not have acted illegally or with material irregularity so as to justify interference in revision under sub-section (*c*), nevertheless, if the erroneous decision results in the Subordinate Court exercising a jurisdiction not vested in it by law, or failing to exercise a jurisdiction so vested, a case for revision arises under sub-section (*a*) or sub-section (*b*) and sub-section (*c*) can be ignored. That was a case where the Subordinate Court dismissed the application of the defendants filed for scaling down a debt under the provisions of the Bengal Moneylenders Act, holding that the loan in question was a commercial loan, and, therefore the Act did not apply. The High Court held that the loan was not a commercial

1. (1948) 2 M.L.J. 576 : 61 L.W. 836. A.I.R. 1949 Mad. 541.
2. I.L.R. (1885) 11 Cal. 6 : 11 I.A. 237.
3. L.R. (1967) 44 I.A. 261 : 33 M.L.J. 69 : I.L.R. 40 Mad. 793 : 6 L.W. 501 (P.C.)
4. L.R. (1949) 76 I.A. 67 : (1949) 1 M.L.J. 505 : I.L.R. (1950) Mad. 1 : A.I.R. 1949 P.C. 156.
5. L.R. (1949) 76 I.A. 131 : (1949) 2 M.L.J. 6: A.I.R. 1949 P.C. 239.
6. (1953) 1 M.L.J. 100 : (1952) S.C.J. 633 : (1953) S.C.R. 136 : A.I.R. 1953 S.C. 23.
7. (1965) 1 M.L.J. (S.C.) 18 : (1965) 1 An. W.R. (S.C.) 18 : (1965) 1 S.C.J. 260 : (1964) 7 S.C.R. 197 : A.I.R. 1965 S.C. 498.

loan and interfered in revision under section 115 (*b*). That was confirmed by their Lordships of the Privy Council. The relevant passage in the above decision of the Privy Council has been quoted with approval by their Lordships of the Supreme Court in *Keshardeo Chamria* v. *Radha Kissen Chamria*[1], and their Lordships further add:

"Reference may also be made to the observations of Bose, J., in his order of reference in *Narayana Sonaji* v. *Sheshro Vithoba*[2], wherein it was said that the words 'illegality' and 'material irregularity' do not either errors of fact or law. They do not refer to the decision arrived at but the manner in which it is reached. The errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with."

Lastly in *Chellammal Unni* v. *Hasanan Samban*[3], the Revenue Divisional Officer, misconstruing the law, had failed to give the tenant time for deposit of the rent under section 3 (4) of the Madras Cultivating Tenants Protection Act (XXV of 1955). The High Court interfered. Their Lordships of the Supreme Court held that the Revenue Divisional Officer had failed to exercise a jurisdiction vested in him by law and that the High Court was justified in interfering under section 115 (*b*).

In view of the observations of the Privy Council and the Supreme Court it cannot be said that in this case the learned Subordinate Judge has acted illegally or with material irregularity, but it is clear that he has failed to exercise a jurisdiction vested in him. In other words, section 115 (*b*) applies and not section 115 (*c*).

In the result C.R.P. No. 1916 of 1966 is allowed. C.R.P. No. 383 of 1967 is allowed in part. The additional written statement will be received, but omitting the last portion of paragraph 2 thereof and paragraphs 5 thereof as already indicated. The petitioners must, however, pay the costs of the respondents-plaintiffs in C.R.P No. 1916 of 1966 (Counsel appeared only therein).

V.M.K. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. S. KAILASAM.

T. Rama Rao .. *Petitioner* *

v.

The Divisional Superintendent, Divisional Office, Personnel Branch, Southern Railway, Guntakkal, and another .. *Respondents.*

Indian Railway Establishment Code, Rule 2008 (d) and (h)—Order of compulsory retirement of railway servant in public interest under clause (h)—Requirements.

Constitution of India (1950), *Article* 311—*Compulsory retirement of public servant before superannuation—Article* 311 *if and when attracted.*

According to clause (*h*) of Rule 2008 of the Indian Railway Establishment Code a railway servant can be retired, if in the opinion of the authority concerned, it is in the public interest to do so, by giving him not less than three months notice. When three months notice had been given it will not become illegal simply because the leave period to which a railway servant was entitled was made to run concurrently with the period of the notice.

1. (1953) 1 M.L.J. 100: (1952) S.C.J. 633 : (1953) S.C.R. 136.: A.I.R. 1953 S.C. 23).
2. A.I.R. 1948 Nag. 238.
3. (1965) 1 M.L.J. (S.C.) 18 : (1965) 1 An. W.R. S. 18 : (1965) 1 S.C.J. 260 : (1964) 7 S.C.R. 197 : A.I.R. 1965 S.C. 498.

* W.P.No. 3686 of 1967. 8th January, 1968.

The satisfaction of the authority as to whether a person should be retired in the public interest or not, is subjective and the decision of the authority cannot be questioned.

An order of compulsory retirement under Rule 2008 (*h*) would not be invalid because the order *ex facie* does not recite that the railway servant was retired in public interest. In such a case the Court is entitled to look into the records to satisfy itself whether the retirement was made in public interest.

The very fact that a public servant was compulsorily retired would not itself amount to a stigma as to attract Article 311 of the Constitution. If there are words in the order which throw any stigma then the order of retirement would amount to removal within the meaning of Article 311. But where, as in the instant case, the order is silent and does not disclose any reason at all, no stigma can be inferred and Article 311 would not be attracted.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records connected with the order dated 3rd November, 1967, and made in No. G./P. 579/II/I/Vol. 2 Divisional Superintendent, Divisional Office, Guntakkal, the first respondent herein and quash the same.

G. K. Damodara Rao and *K. A. Thanikachalam*, for Petitioner.

B. T. Seshadri, for Respondents.

The Court made the following

ORDER.—This petition is filed by a Chief Clerk in the Southern Railway for the issue of a writ of *certiorari* calling for the records connected with the order of the Divisional Superintendent, Personnel Branch, Southern Railway, dated 3rd November, 1967, retiring the petitioner from service on three months notice, and quashing the said order. The impugned order of retirement dated 3rd November, 1967, may be extracted.

"You have attained the age of 55 years on 12th July, 1966 (A.N.) It has been decided by Dy. C.C.S./Gen./Mas to retire you from Railway Service on three months notice.

You are allowed to avail 21 days L.A.P. and 404 days L.H.A.P. for which you are eligible from 7th November, 1967. This leave and the period of notice will run concurrently. You will be treated as having retired from Railway with effect from 4th January, 1959 (A.N.)."

Rule 2046 of the Indian Railway Establishment Code regulates the age of retirement of railway servants. Rule 2046 (F.R. 56) provides that except as otherwise provided in the said rules, every railway servant shall retire on the day he attains the age of fifty-eight years. In the case of a ministerial railway servant, who entered service on or before the 31st March, 1938, and held on that date a permanent post in a provisional substantive capacity under clause (*d*) of rule 2008 and continued to hold the same without interruption until he was confirmed in that post shall be retained in service till the day he attains the age of sixty years. The petitioner having entered service on 8th March, 1937, is entitled to the benefit of this rule as well and he is entitled to be retained in service till he attains the age of sixty years. But clause (*h*) of the rule provides that notwithstanding anything contained in the rule the appointing authority shall, if it is of the opinion that it is in the public interest to do so, have the absolute right to retire any railway servant on attainment of the age of fifty-five years or thereafter by giving him notice of not less than three months in writing.

The petitioner attained the age of fifty-five years on 12th July, 1966, and after he attained the age of fifty-five years and when he was running the fifty sixth year this notice was given. According to clause (*h*) a railway servant can be retired, if, in the opinion of the authority, it is in the public interest to do so, by giving him not

less than three months notice. In this case the three months notice has been given. It was contended on behalf of the petitioner that the leave period to which the petitioner was entitled was made to run concurrently with the period of notice and that this is not legal. I am unable to accept this contention, for all that is required under clause (*h*) is three months notice and this has been provided for in the notice.

It was next contended that the notice was discriminatory in that the petitioner, who had two censures, was retired, while persons with equally bad records were continued in service after fifty-five years. This question cannot be gone into as the satisfaction of the authority, as to whether a person should be retired in public interest or not, is subjective, and the decision of the authority cannot be questioned.

Mr. Damodara Rao, the learned Counsel for the petitioner submitted that the order *ex facie* did not show that the petitioner was retired in public interest and therefore, the order is not valid. When the order *Ex Facie* does not recite that the petitioner was retired in public interest, the Court is entitled to look into the records to satisfy itself whether the retirement was made in public interest. On the records it cannot be said that the authorities were not justified in retiring the petitioner in public interest.

It was next contended that a public servant was not likely to have been retired unless his service was not satisfactory and that the authorities were of the opinion that it was not desirable to continue him in service which in effect would mean that the officer was not being continued in service due to a stigma. If a railway servant is retired due to a stigma it was submitted that the provisions of Article 311 will be attracted, and the procedure prescribed by that Article should be followed.

The plea that the very fact that a public servant was compulsorily retired before he reached the age of superannuation would itself amount to a stigma was negatived by the Supreme Court in *I. N. Saksena* v. *State of M. P.*[1]. The test laid down by the Supreme Court there is:

> "Where an order requiring a Government servant to retire compulsorily contains express words from which a stigma can be inferred, that order will amount to a removal within the meaning of Article 311. But where there are no express words in the order itself which would throw any stigma on the Government servant, we cannot delve into Secretariat files to discover whether some kind of stigma can be inferred on such research."

In *State of U.P.* v. *Madan Mohan*[2], the Supreme Court reiterated its decision in *Shyam Lal* v. *State of Uttar Pradesh*[3], where it was held:

> "When an authority wants to terminate the services of a temporary servant it can pass a simple order of discharge without casting any aspersion against the temporary servant or attaching any stigma to his character. As soon as it is shown that that order purports to cast an aspersion on the temporary servant, it would be idle to suggest that the order is a simple order of discharge. The test in such cases must be: does the order cast aspersion or attach stigma to the officer when it purports to discharge him? If the answer to this question is in the affirmative, then notwithstanding the form of the order, the termination of service must be held, in substance, to amount to dismissal."

The result of the two decisions is that the order of retirement of the petitioner can be sustained, if *primâ facie* the order does not contain express words from which a stigma can be inferred. If there are words which throw any stigma, then the order of retirement would amount to removal within the meaning of Article 311. In this case, as already stated, the order does not disclose any reason at all, and applying the test laid down by the Supreme Court in the two decisions cited above the validity of the order cannot be questioned.

1. A.I.R. 1967 S.C. 1264.
2. (1967) 1 S.C.J. 805 : A.I.R. 1967 S.C. 1260.
3. (1954) S.C.J. 492 : (1954) 1 M.L.J. 730 : (1955) 1 S.C.R. 26 : A.I.R. 1954 S.C. 369.

Mr. Damodara Rao, the learned Counsel submitted, that, if so construed it would lead to anomalous results in that an order in which valid reasons are given for retiring a railway servant in public interest would be held to come under Article 311 while an order in which no reasons are given whether there are grounds to retire in public interest or not, the retirement will be valid. It cannot be said that the argument thus put is without substance. But the two decisions of the Supreme Court cited are very explicit to allow of any further controversy. The writ petition is therefore dismissed. No order as to costs.

V.K. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE K. S. RAMAMURTHI.

Karuppa Goundar .. *Appellant**

v.

Muthuswami Goundar .. *Respondent.*

Co-owners—Common well—Co-owners having equal share in the well—Rights of enjoyment—One co-owner installing pumpset in the well—Whether unreasonable user or enjoyment of his right—Cause of action, if there is substantial deprivation or infringement of other co-owner's right—Suit by one co-owner for declaration that the other is not entitled to instal pumpset—Whether sustainable.

It cannot be said that the co-owner's act in the installation of a pumpset and using the same for taking and drawing water and irrigating the lands is an unreasonable user or enjoyment of his right. Each co-owerner is entitled to enjoy the common property in the best and most advantageous manner so long as there is no invasion or infringement of the rights of the other co-owner or co-owners. If, however, by th defendant enjoying his right to take water from the well, there is substantial deprivation or infringement of the rights of the plaintiff, in the sense that the plainiff is effectively prevented from enjoying his right to take water from the well, the plaintiff may have a cause of action. That cause of action is not because the defendant has installed a pumpset but because the defendant as a co-owner in his enjoyment of his rights in the property, prevents the plaintiff from enjoying the latter's interests in the well. If the plaintiff is deprived of the mamool supply of water from the well or his rights to take a mamool supply from the well is seriously affected as a result of the defendant installing the pumpset, it is for the plaintiff to file a suit making the necessary averments and establish to what extent and in what manner, the conduct of the defendant in installing a pumpset, had infringed or affected the rights of the plaintiff. Without such a case being specifically put forward and without the materials being made available to the Court it is not possible to afford any relief to the plaintiff in this suit, which is merely a suit for a bare declaration in the abstract that the defendant, as a co-owner, has no right to instal a motor pumpset.

Appeal against the Decree of the Court of the Subordinate Judge, of Salem in Appeal Suit No. 79 of 1962, preferred against the Decree of the Court of the District Munsif of Namakkal in Original Suit No. 637 of 1959.

R. Gopalaswamy, for Appellant.

P. S. Balakrishnan and *P. S. Ramachandran*, for Respondent.

The Court delivered the following:

JUDGMENT.—The plaintiff is the appellant in this Second Appeal. The plaintiff and the defendant are each entitled to a half share in a well situate in the plaintiff's land. The defendant has installed a pumpset and by using the same is irrigating his lands. The plaintiff filed a suit for declaration that the defendant is not entitled to fix the pumpset on the ground that it is a common well belonging to the

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*S.A. No. 1908 of 1962. 25th October, 1966.

plaintiff and the defendant. Consequent upon the declaration, the plaintiff also prayed for an injunction restraining the defendant from fixing the pumpset. The Courts below, following the judgment of this Court in S.A. No. 73 of 1956 negatived the claim of the plaintiff and held that a co-owner of a well is entitled to enjoy his right to take water from the well for irrigating his land by installing a pumpset. It cannot be said that the co-owner's act in the installation of a pumpset and using the same for taking and drawing water and irrigating the lands is an unreasonable user or enjoyment of his right. Each co-owner is entitled to enjoy the common property in the best and most advantageous manner so long as there is no invasion or infringement of the rights of the other co-owner or co-owners. It is not open to the plaintiff, to dictate to the defendant as to how best the defendant is to enjoy his right to take water from the well, of which he is a co-owner, having half-share therein. If, however, by the defendant enjoying his right to take water from the well, there is a substantial deprivation or infringement of the rights of the plaintiff, in the sense that the plaintiff is effectively prevented from enjoying his right to take water from the well, the plaintiff may have a cause of action. That cause of action is not because the defendant has installed a pumpset but because the defendant as a co-owner in his enjoyment of his rights in the property, prevents the plaintiffs from enjoying the latter's interests in the property. If the plaintiff is deprived of the mamool supply of water from the well or his right to take the mamool supply from the well is seriously affected as a result of the defendant installing the pumpset, it is for the plaintiff to file a suit making the necessary averments and establish to what extent and in what manner, the conduct of the defendant in installing a pumpset, had infringed or affected the rights of the plaintiff. Without such a case being specifically put forward and without the materials being made available to the Court it is not possible to afford any relief to the plaintiff in this suit, which is merely a suit for a bare declaration in the abstract that the defendant, as a co-owner, has no right to instal a motor pumpset.

Learned Counsel for the plaintiff-appellant urged that applying the principle of the decision of our High Court in *Lingappa Goundan* v. *Ramaswami Goundan*[1], where it was held that where a plurality of persons are entitled to rights of irrigation by the use of baling apparatus, some safeguards may be provided by the Court by fixing turns as regards to the time at and the days on which the parties concerned may draw water. In the instant case, there is no proof that the rights of the plaintiffs have in any way been affected. In fact a perusal of the judgment of the Courts below indicates that the plaintiff has not sustained any damage or any injury. Further, I am of opinion that without adequate data about the extent of the lands irrigated, the diamensions of the well, the nature of the sorings and the quantity of the water available during rainy season and the rest of the year, it is not possible to impose any restriction or give any indications as to how the plaintiff and the defendant should enjoy their right to take water from the well. It may be that even if the defendant uses the pumpset all throughout the week, there may still be enough water left for the plaintiff to irrigate his lands, or it may be that the lands which the plaintiff irrigates may be far less in extent than the lands which the defendant is irrigating with the use of the water from the well. The position may be *vice versa*. As observed earlier it depends upon very many factors about which there is no pleading no evidence.

The reservation made in the judgment of the trial Court that the plaintiff will be at liberty to make an application in this suit itself for providing for safeguard meaning thereby fixing terms etc., cannot be sustained. So far as this suit is concerned, it has to be dismissed on the simple ground that it is misconceived, having regarding to the unqualified relief which the plaintiff asked for in the suit. It will be open to the plaintiff to file a separate suit in case his right to take water from

1. (1945) 1 M.L.J. 347.

the well for irrigating his land is substantially interfered with in the sense that the working of the pumpset by the defendant results in substantial diminution in the supply of water to the plaintiff for irrigating his land.

The result is, the Second Appeal fails and is dismissed with costs. No leave.

S.V.J. — *Second appeal dismissed; No leave.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

M/s. Rajasthan Investment Corporattion, Madras-17 .. *Petitioner**

v.

The Deputy Commercial Tax Officer, T. Nagar Division, Madras .. *Respondent.*

The Madras General Sales Tax Act (I of 1959), *section* 46 (1) (a) *and* (1) (b)—*Applicability of—Composition of offences—Assessment not completed—Section* 46 (1) (b) *applies and not section* 46 (1) (a)—*Notice mentioning wrong provison of law for fixing composition fee—Validity of.*

Constitution of India (1950), *Article* 226—*Alternative remedy of revision available—Direction in the notice patently illegal and without jurisdiction—Remedy under Article* 226 *can be availed.*

S. 46 (1) (*a*) of the Act refers to cases of completed assessment where the assessee has either failed to pay the tax levied or has done something which amounts to evasion of the payment of tax which is recoverable under the Act. That this should be the meaning of section 46 (1) (*a*) will also be clear from the provision in that section that the composition will be in addition to the tax recoverable. Where there is no question of an assessment having been completed, there is no fixing of an amount of tax a recoverable and it will be totally inapropriate as well as illegal to resort to section 46 (1) (*a*) for determining the amount of compensation fee payable in lieu of prosecution. The appropriate provisions must be the residual provision contained in section 46 (1) (*b*).

The petioner might be willing to pay a lesser amount of Rs. 1,000 and avoid the prosecution but where an amount of composition fee which is totally illegal and which is far in excess of what the law permits has been proposed to be imposed on him in lieu of prosecution, be will be greatly prejudiced. The notice, which contains as an essential ingredient, a proposal to levy composition fee far in excess of what statute has prescribed as maximum, is illegal.

Direction in the notice being patently illegal and without. Jurisdiction, the petitioner can avail the remedy by way of a writ, even though alteranative remedy or revision is available.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased issue a writ of prohibition (after calling for the records in O.R. No 2/64, 65 dated 11th May, 1964, on the file of the Respondent herein) and restrain the Respondent from proceeding with the threatened procecutions of the petitioner in the Court of the VI Presidency Magistrate, Madras, under section 45 (2) (*d*) of the Madras General Sales Tax Act.

V. Ramachandran, for Petitioner.

J. Kanakaraj, for the Government Pleader, for Respondent.

The Court made the following

ORDER.—The petitioner in this petition filed under Article 226 of the Constitution for the issue of a writ of prohibition is the Rajasthan Investment Corporation. The petitionor makes the following allegations in the affidavit appended to the petition. The petitionr carries on business as a financier of hire purchase transac-

*W.P. No. 857 of 1964. 11th January, 1967.

tions and motor vehicles. The nature of the transactions is to advance moneys on the security of motor cars to people who went to purchase cars. But the transactions do not constitute sales within the meaning of the Madras General Sales Tax Act and the petitioner is not a dealer as defined under that Act. Nevertheless on 11th June, 1964 the respondent the Deputy Commercial Tax Officer, T. Nagar issued a notice to the petitioner as below.

"Messrs. Rajasthan Investment Corporation are doing the business of hire purchase of automobiles. During the year 1958-59 they have had transactions to the extent of Rs. 24,224. As the assessees are the first dealers in this State, they are liable to pay tax at 6 per cent. on the above transactions. The tax amounts to Rs. 1,453-44." The dealers should have filed a return in Form-A-I showing the turnover for the year 1958-59 on or before 1st May, 1959. They failed to do so and thereby committed an offence punishable under section 45 (2) (*a*) of the Madras General Sales Tax Act, 1959.

"The dealers are hereby required to appear before me in my office at 10-30 A.M. on 18th May, 1964, and state why they should not be prosecuted in the Court of the Sixth Presidency Magistrate for the said offence. If they are willing to have the offence compounded departmentally, by paying a compounding fee of Rs. 2,908 they may state their willingness in writing on the stipulated date." The petitioner contends that by the date of this notice more than five years had lapsed from the end of the year to which the transactions related, that he could not be assessed to sales tax for the turnover even on the footing that the transactions were sales and that therefore the notice asking him to show cause why he should not be prosecuted under section 45 (2) (*a*) of the Madras Generla Sales Tax Act is illegal and *ultra vires*, and it is therefore necessary that a writ of prohibition should issue restraining the respondent from proceeding further in pursuance of the abovesaid notice. There was also another allegation in the affidavit of the petitioner that even assuming the notice would be valid in other respects, the failure to submit a return which is the main allegation in the notice, would fall under section 46 (1) (*b*) of the Madras General Sales Tax Act, 1959, and that section provides a maximum composition fee of Rs. 1,000. The procedure of the respondent in treating the alleged contravention as falling under section 46 (1) (*a*) for which the composition fee is fixed at a sum not exceeding Rs. 1,000 or double the amount of the tax recoverable whichever is greater is also a ground vitiating the notice.

Learned Counsel for the petitioner at the time of the hearing of the writ petition referred to a decision of a Full Bench of this Court in *Public Prosecutor* v. *V. M. Ramalingam Pillai*[1], That decision dealt with the scope of section 16-A of the Madras General Sales Tax Act of 1939, which is analogous to Section 48 (2) of the Madras General Sales Tax Act, 1959, which states.

"The validly of the assessment of any tax; or of the levy of any fee or other amount, made under this Act, or the liability of any person to pay any tax, fee or other amount so assessed or levied shall not be questioned in any Criminal Court in any prosecution or other proceeding whether under this Act or otherwise."

In the view of the Full Bench, when a person is prosecuted under section 16-A of the Madras General Sales Tax Act, 1939 it will not be open to him to raise any objection, plea or contention which he could have raised before the authorities set up under the General Sales Tax Act, and it will be open to him to raise only those pleas, objections and contentions which those authorities are precluded from entertaining. Learned Counsel for the petitioner argues that on the same reasoning, when the petitioner has to face a prosecution as it is proposed in the notice for having failed to submit a return for the year in question, the criminal Court would be debarred from examining his liability to be assessed to tax including the question whether he is a dealer and whether the transactions in which he took part were sales or not. Without an examination of these questions his liability to be convicted cannot be determined. For the aforesid reasons it is urged before me by the

1. 9 S. T. C. 510.

learned Counsel for the petitioner that the proposal to prosecute him cannot be sustained, because by reason of the principles laid down in the decision cited above, the criminal Court will be precluded from considering all the defences, which the petitioner wants to rely in support of his action in having failed to submit a return. Per contra the learned Government Pleader submits that the decision in *Public Prosecutor* v. *V. M. Ramalingam Pillai*[1], as well as the principles laid down in section 48 (2) of the Madras General Sales Tax Act, 1959 (section 16-A of the Madras General Sales Tax Act, 1939) relates to completed assessments and can have no application to cases like the present one where there has been no completed assessment and where further no assessment may not at all be possible to be made in view of the lapse of time. No doubt the Full Bench has referred at page 527 to the difficulties, which the Magistrate might be faced with if he is asked to consider about the propriety of an assessment at a trial where he is bound to follow the rule of the Evidence Act but on the other hand, the authorities set up by the Sales Tax Act are persons who may be presumed to have acquired by sheer experience proficiency and skill in making estimates and computations requisite to arriving at a reasonable figure, whereas the Magistrates do not usually have the training or facilities for the purpose. These observations must be considered in the context of a completed assessment because we find earlier in the same judgment at page 519, the observations, that where tax is determined after notice to the assessees, it is not repugnant to rules of natural justice to provide that the validity of assessment shall not be questioned at the stage of realisation of the tax and that the provision in section 16-A of the Sales Tax Act is analogous to the rule which precludes the judgment-debtors from putting forward at the stage of execution of a degree, defences that were open to them in the suit itself. On the other hand there is another Full Bench decision of this Court of a much earlier date relating to the prosecution under the Local Boards Act, in *Ramaswami* v. *President, Taluq Board, Tadepalligudam*[2], where the Full Bench has held:

> "When a Local Board moves a Magistrate under section 221 of the Madras Local Boards Act, 1920, to recover a penalty imposed under section 164 (1) of that Act for alleged encroachment on land belonging to the Board, the defaulting party can plead that there was no encroachment at all, and the Magistrate can go into the question whether the alleged encroachment was true and therefore justified the imposition of the penalty."

In a decision given by me in *Public Prosecutor* v. *Ramachandra Chettiar*[3], it was held that the provision of a time limit of five years for assessing escaped turnover cannot be relied upon as an automatic bar for a prosecution under section 45 (2) of the Act, for an offence of wilful submission of a false return in respect of a period prior to five years. Even in such circumstances a prosecution can be maintained but it will be for the prosecution to adduce data from which the criminal Court could come to the inference that the return submitted by the dealer was false or inaccurate.

But in the circumstances of this case it appears to me that it is unnecessary to decide on the question thus propounded, whether by reason of section 48 (2) the proposed prosecution should be struck down as not maintainable, because more than five years had lapsed from the date to which the alleged return relates, and because there is no actual assessment involving a determination by the authorities of the Sales Tax Department that the petitioner's transactions are sales and the petitioner is a dealer under the Sales Tax Act. The reason is this. Under section 46 (1) (*a*) relating to the composition of offences the prescribed authority is required to give to the person who has committed or is reasonably suspected of having committed an offence under this Act an option to pay within a specified period by way of composition of such offences where the offence consists of the failure to pay, or the evasion of any tax recoverable under the Act, in addition to the tax so recoverable a sum of money not exceeding one thousand rupees or double the amount of

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1. 9 S.T.C. 510.
2. (1930) I.L.R. 53 Mad. 873 : (1930) 59 M.L.J. 346. (F.B.).
3. (1956) 2 M.L.J. 446.

the tax recoverable, whichever is greater. It is under this section that in the notice now impugned the petitioner has been directed to state his willingness in writing before the stipulated date to pay the compounding fee of Rs. 2,908 in lieu of prosecution for the offences under section 45 (2) (*d*) of the Act. The learned Government Pleader represents that this amount has been arrived at on a computation under the Sales Tax Act of the tax which the petitioner might be liable to pay treating the alleged hire-purchase transactions as sales. In other words the composition fee is fixed with reference to section 46 (1) (*d*) of the Act. It is obvious that section 46 (1) (*a*) of the Act refers to cases of completed assessment where the assessee has either failed to pay the tax levied or has done something which amounts to evasion of the payment of the tax which is recoverable under the Act. That this should be the meaning of section 46 (1) (*a*) will also be clear from the provision in that section that the composition will be in addition to the tax recoverable. But in the present case there is no question of an assessment having been completed, and therefore there is no fixing of an amount of tax as recoverable. Therefore it will be totally inappropriate as well as illegal to resort to section 46 (1) (*d*) for determining the amount of compensation fee payable in lieu of prosecution. The appropriate provisions must be the residual provision contained in section 46 (1) (*b*) which fixes a maximum of Rs. 1,000 for the composition.

As regards the further question whether the notice is vitiated because a wrong provision of law for fixing composition fee is mentioned therein it appears to me that the petitioner might be willing to pay a lesser amount of Rs. 1,000 and avoid the prosecution but where an amount of composition fee which is and which is far in excess of what the law permits has been proposed to be imposed on him in lieu of prosecution, he will be greatly prejudiced. I am of opinion that the petitioner's submission is right, and the impugned notice, which contains as an essential ingredient, a proposal to levy composition fee far in excess of what the statute has prescribed as maximum must be struck down as illegal. The learned Government Pleader refers to a recent decision of Venkatadri, J., in Writ Petition No. 632, etc. of 1963 where the learned Judge has made the observation that a proceeding for composition fee under section 46 will give rise to a revision under section 33 and that the petitioner will have an alternative remedy of revision. But since in the present case the direction in the notice appears to be patently illegal and without jurisdiction, the remedy now sought by way of a writ can be made available to the petitioner. Therefore the *rule nisi* is made absolute, and the respondent will be restrained from proceeding further with the notice in its present form. As mentioned already I am not expressing any opinion in this case on the further question raised earlier as to whether in the absence of a completed assessment a notice for prosecution for non-submission of a return under section 45 (2) (*a*) can be maintained or not. There will be no order as to costs.

S.V.J. *Rule nisi made absolute.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. S. KAILASAM.

P. V. Srinivasan .. *Petitioner**

v.

The Prescribed Judicial Authority (District Judge) Salem, and another .. *Respondents.*

Madras District Municipalities Act (V of 1920), *section* 50 (1) (hh) *and section* 331 (1)—*Municipal councillor to cease to hold his office on his failure to pay the arrears due to the Municipality within* 3 *months of the service of the notice—Under section* 331 (1) *notice could be effected by leaving the notice at the last known place of abode if the person is not found—Bill Collector throwing the notice through the window—Notice of arrears, if properly served—Benefit of Illustration* (e) *to section* 114 *of the Evidence Act, if could be invoked.*

Section 50 (1) (*hh*) of the Madras District Municipalities Act, *inter alia* provide that a councillor shall cease to hold his office if he fails to pay arrears of any kind due by him (otherwise than in a fiduciary capacity) to the Municipality within three months after a bill or notice has been served upon him under the District Municipalities Act or where in the case of any arrear District Municipalities Act does not require the service of any bill or notice, within three months after a notice requiring payment of the arrear........has been duly served upon him by the executive authority.

Section 331 (1) of the Act provides that when any notice is required to be served on any person by the Act, the service may be effected (*a*) by giving or tendering the said document to such person, or (*b*) if such person is not found by leaving such document at his last known place of abode or business or by giving or tendering the same to some adult member or servant of his family.

The respondent Councillor was in arrears of property tax and water charges. The Bill Collector, finding the house of the respondent closed, threw the demand notices inside the house through the window which was found open.

Held that, service of notice by leaving the notice at the last known place of abode could be effected only if the Bill Collector attempted to serve the notice on the respondent and could not do so. As there had been no effective service of notice, the respondent cannot be held to have ceased to hold office as a Councillor or as Chairman. The water charges had been paid within three months of the publication of the general notice.

Held also that, the benefit of the presumption under *Illustration* (*e*) of section 114 of the Indian Evidence Act cannot be invoked as the disqualification pleaded will have to be established.

W. P. No. 2760 *of* 1966.—Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in O.P. No. 93 of 1965 on the file of the Respondent No. 1 and quash the order dated 12th September, 1966, and made therein, and

C.R.P. No. 2212 *of* 1966.—Petition under Article 227 of the Constitution of India, praying the High Court to revise the order of the District Judge of Salem dated 12th September, 1966, and made in O.P. No. 93 of 1965.

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* W.P. No. 2760 of 1966 and C.R.P. No. 2212 of 1966. 21st March, 1967.

T. S. Subramaniam, for Petitioner.

T. Selvaraj and *G. Ramanujam*, for 2nd Respondent.

The Court made the following

ORDER.—Writ Petition No. 2760 of 1966 is filed by a Councillor of the Salem Municipal Council for the issue of a writ of *certiorari* calling for the records of the District Judge of Salem in O.P. No. 93 of 1965 and to quash his order dated 12th September, 1966 holding that the respondent, Ramakrishnan, was not disqualified to hold office as Municipal Councillor due to failure to pay taxes. C.R.P. No. 2212 of 1966 is also filed by the same Councillor praying that the order of the District Judge Salem, made in O.P. No. 93 of 1965 be set aside as illegal and unsustainable in law.

As both the writ petition and the revision petition are against the same order, they may be dealt with by a common judgment. The petitioner filed O.P. No. 93 of 1965 before the District Judge, Salem, under section 51 (1) of the Madras District Municipalities Act alleging that the respondent Ramakrishnan failed to pay arrears of taxes due to the Municipality and thereby ceased to hold office as Municipal Councillor. The respondent Ramakrishnan is the Chairman of the Salem Municipal Council. He owns four houses in Komarasamipatti West Street bearing door Nos. 106, A B C. 107, 107-A and 124 with assessment Nos. 899, 900, 901 and 2273. The properties are registered in the name of "Ramakrishnan and Brothers" in the Municipal Demand Register. A house service connection for supply of water to door No. 124, Komarasamipatti West Street is given in the name of the respondent Ramakrishnan. The half-yearly taxes for these properties for the half-years ending with 30th September, 1964, 31st March, 1965, 30th September, 1965 and 31st March, 1966 were not paid by the respondent or by any of his brothers. After the Original Petition was filed on 19th December, 1965 the taxes were remitted on 21st December, 1965. Apart from the house taxes due it was also alleged that the respondent Ramakrishnan had to pay some water charges due to the Municipality, which he failed to pay and as such he became disqualified, under section 50 (1) (*hh*) of the Madras District Municipalities Act.

The only question that arises for consideration is whether the respondent Ramakrishnan ceased to hold office under section 50 (1) (*hh*) of the Madras District Municipalities Act. Section 50 (1) (*hh*) provides that a Councillor shall cease to hold his office if he fails to pay arrears of any kind due by him (otherwise than in a fiduciary capacity) to the Municipality within three months after a bill or notice has been served upon him under the District Municipalities Act or where in the case of any arrear District Municipalities Act does not require the service of any bill or notice, within three months after a notice requiring payment of the arrear (which notice it shall be the duty of the Executive Authority to serve at the earliest possible date) has been duly served upon him by the Executive Authority. That the respondent Ramakrishnan was in arrears of property tax and water charges is not contested. The question is whether the requirements of section 50 (1) (*hh*) had been complied with. Sub-section 1 (*hh*) requires that a Councillor to cease to hold his office should have failed to pay arrears due to the Municipality within three months after a bill or notice had been served upon him under the Act and in cases in which any arrear under the Act does not require the service of a bill or notice within three months after a notice requiring payment of the arrears had been duly served upon him. Regarding the arrears of house tax the case for the petitioner is that a notice was served and that the respondent Ramakrishnan failed to pay the arrears within three months after the receipt of the notice. Regarding water charges where the Act does not require service of any bill or notice it was contended that the arrears were not paid within three months after service of notice requiring payment of water charges on the respondent Ramakrishnan.

The method of serving a notice is prescribed in section 331 (1) of the Act. It provides that when any notice is required to be served on any person by the Act, the service may be effected (*a*) by giving or tendering the saiddocumeno to such

person, or (*b*) if such person is not found, by leaving such document at his last known place of abode or business or by giving or tendering the same to some adult member or servant of his family. It is unnecessary for the purpose of this petition to consider the other modes of service provided for in the section. The service of notice can be effected by either giving or tendering the same to such person, or if such person is not found by leaving such document at his last known place of abode or business. In this case the service of notice was effected by the Bill Collector, P.W. 1. As his evidence is material for deciding the question, the relevant portion of his evidence may be extracted:

> "Respondent and his brothers are living in that house. For 1963-1964 and 1964-1965, I gave demand notices in the house. The house was found closed and I threw the demand notices inside the house through the window which was found open. For serving demand notices I used to go to houses. I went thrice to the house of the respondent. Tax was not paid."

There was practically no cross-examination of this witness and so the statement of this witness can be taken as accepted. The learned District Judge also has accepted the evidence of this witness. Section 331 (1), as already pointed out, requires that the service of notice may be effected by giving or tendering the notice to the person. This admittedly was not done. When a person is not found, the alternative method of service is by leaving the document at this last known place of abode or business. But the mode of service by leaving the document at the last known place of abode or business is available only when the person is not found. The learned District Judge was of the view that as the respondent was the Chairman of the Municipality, he could be expected to be in his office and that the notice might have been tendered to him in the office. He also observed that the respondent's brothers were also living in the house and that if the Bill Collector wanted to serve the notice he could have tendered it to the respondent or to his brothers. The reasoning of the learned District Judge may not be correct, for it is not incumbent on the Bill Collector to search for the respondent's brothers personally. It would be sufficient compliance if the Bill Collector attempted to serve the notice on the respondent in the house. If he had attempted to serve on the respondent in the house and if the respondent was not found, he would have been justified in leaving the document in the house. The Bill Collector does not say in his evidence that in the house the respondent Ramakrishnan was not found and therefore he left the notice in the house. The service of notice by leaving the same in the house could be effected only when the person is not found. There is no evidence that the Bill Collector attempted to find whether Ramakrishnan was in the house. All that he says in the evidence is that " the house was found closed and I threw the demand notices inside the house through the window which was found open ". The witness does not say that the house was locked or that he attempted to serve the notice on the respondent Ramakrishnan and that he could not be found. The learned District Judge may not be right in stating that leaving such document at his last known place of abode or business does not by any stretch of imagination mean throwing the notice through the window without making any attempt to contact any adult member or servant of the family. Service by leaving the document at the last known place of abode or business is different from giving or tendering the notice to some adult member or servant of the family. Service of notice by leaving the notice at the last known place of abode could be effected only if the Bill Collector attempted to serve the notice on the respondent Ramakrishnan and could not do so. Even accepting the entire evidence of the Bill Collector there is nothing to show that an attempt was made to serve the notice on the respondent Ramakrishnan or any one of the members of the joint family. As there had been no effective service of notice the respondent Ramakrishnan cannot be held to have ceased to hold office as a Councillor or as Chairman.

It was submitted that so far as water charges are concerned the by-laws of the Municipality framed under clause (3) of the section 306 of the Madras District

Municipalities Act, 1920 provide that the tap rates for each month shall be always payable in advance on or before the fifth of every month. So far as water charges are concerned, the District Municipalities Act or the rules or the by-laws framed thereunder do not require any service of notice. In such a case section 50 (1) (*hh*) provides that the arrears should be paid within three months after a notice requiring payment of the arrears has been duly served upon the Councillor by the Executive Authority. In this case a general notice calling upon the consumers to pay water charges was issued on 19th October, 1965, and the charges were paid by the respondent on 21st December, 1965, which was within three months from the date of the publication of the notice. As the charges had been paid within three months of the publication of the general notice, it is unnecessary to consider the question whether under section 50 (1) (*hh*) a separate notice should be served upon the respondent Ramakrishnan. Thus on the evidence there is nothing to show that a notice as required under section 331 (1) had been served on the respondent Ramakrishnan calling for payment of tax or arrears of water charges. The respondent Ramakrishnan has therefore not ceased to hold office as Councillor or as Chairman. The Writ Petition and the Civil Revision Petition are dismissed. There will be no order as to costs.

These petitions having been set down this day for being mentioned, the Court made the following

ORDER.—On 20th March, 1967 it was mentioned by the learned Counsel for the petitioner that he inadvertently failed to contend that the presumption under section 114, *Illustration* (*e*) of the Evidence Act should be invoked and that he may be permitted to do so. Permission was granted. *Illustration* (*e*) entitles the Court to presume that official acts have been regularly performed. The benefit of the presumption cannot be invoked as the disqualification pleaded will have to be established. The Bill Collector was examined and his evidence does not make out that due service had been effected. In the circumstances recourse cannot be had to section 114 of the Evidence Act. The contention is rejected.

V.M.K. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE K. VEERASWAMI.

Mohamed Ebrahim & Co., (P.) Ltd. .. *Petitioner**

v.

Sridhar & Co. .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10 (3) (a) (iii) *and* (ii) *and* (3) (*c*)—*Separate eviction petitions against different tenants in a building for owners occupation—During pendency of a petition landlord obtains possession of parts of building from other tenants—Effect of—Maintainability of pending petition—Whether to be viewed as one under section* 10 (3) (*c*) *for additional accommodation.*

The various clauses of section 10 will have to be read and understood in the context of each other and a comparison of clause (*d*) and (*c*) of sub-section (3) of section 10 shows that clause (*c*) applies only where a landlord is already in occupation of a part of a building and requires additional accommodation. Clause (*a*) of sub-section (3) of section 10 covers a case of a landlord who is not in occupation of a building or part of it and requires it for his own occupation for the purpose of his residence or of carrying on his business. Clause (ii) of the second proviso to sub-section (3) (*a*) is inapplicable to a petition for eviction during the pendency of which the landlord takes possession of another building or part of it by an independent petition for, it is inappropriate to say that the landlord applies again under the same clause for eviction.

*C.R.P. No. 1774 of 1966. 19th July, 1967.

If a landlord files a separate eviction petition against each of the tenants in a building and during the pendency of one, obtains possession of parts of the building from one or more of the tenants, who are respondents in other applications, by no stretch of imagination can it be said that the application, which remains to be disposed of, is one that has been filed again by the landlord within the meaning of the proviso. The proviso does not bar such a petition. Nor is, there anything in the proviso of the rest of the provisions of sub-section (3) (*a*) or clause (*c*) of that sub-section to justify the view that on account of the fact that during the pendency of an eviction petition, possession of a part of the building has been taken, as a result of another eviction petition, the petition so pending should, for that reason, be viewed as one under section 10 (3) (*c*) for additional accommodation.

Held on facts :—The petitioner is entitled to an order for eviction under section 10 (3) (*a*) (*iii*). Assuming that section 10 (3) (*c*) is applicable, petitioner needs additional accommodation for the purpose of its business.

Petition under section 25 (1) (*a*) (*ii*) of the Madras Act XVIII of 1960 praying the High Court to revise the order of the Small Cause Court, Madras, in H. R.A. No. 632 of 1965 in H. R. C. 842 of 1963, Additional Rent Controller, Madras.

V. Srinivasan, for Petitioner.

V. Thyagaraja Ayyar, for Respondent.

The Court delivered the following

JUDGMENT.—This petition is to revise an order of the Third Judge, in the Court of Small Causes, by which he allowed the appeal by the tenant and dismissed the petition filed by the landlord for eviction. The landlord, who is the petitioner in this Court, purchased on 22nd November, 1961 the premises bearing Nos. 11-A-1 and 11-A-2 for a sum of Rs. 3,00,000. (three lakhs). The petitioner is a private limited company carrying on its business at Nos. 7 and 8, Mount Road, Madras, in electrical goods, radios, tape recorders and other goods. It has a branch in upstairs of Nos. 26 and 27 Rattan Bazaar, Madras, besides a godown behind the Life Insurance Corporation building in Mount Road. All these buildings have been taken on lease on heavy rents by the petitioner for the purpose of its business. It appears the rent for the premises Nos. 7 and 8, Mount Road, known as Victory House, was Rs. 2,000 per mensem and since 1964, it has been increased to Rs. 2,500 per mensem. At the time of the purchase of the premises Nos. 11-A-1 and 11-A-2, Mount Road, there were three tenants, Royal Printing Works, My Coffee Bar, and Shridar & Co., The last of the tenants is the respondent before me. On the ground that its business had expanded enormously and that it required the premises for its own occupation to carry on its business, the petitioner applied separately for eviction of the Royal Printing Press and the respondent and instituted a suit against My Coffee Bar in ejectment, since having regard to the quantum of monthly rent it was having for the portion in its occupation, the tenancy was, as the law stood then, outside the purview of the Madras Building (Lease and Rent Control) Act, 1960. Subsequently, when the law was amended and the tenancy of My Coffee Bar came within the purview of the Act, the petitioner withdrew the suit and filed an eviction petition against My Coffee Bar. It is common ground that on 28th March, 1963 an eviction order was passed by the Rent Controller against the Royal Printing Works. About four months thereafter, a major portion of the part of the premises in the occupation of the Royal Printing Works was taken possession of by the petitioner. The petition against My Coffee Bar was dismissed by the Rent Controller in June, 1965, and the landlord's appeal failed in March, 1966. But the Civil Revision Petition against the appellate order ended in a compromise on 14th March, 1967, My Coffee Bar consenting to an eviction order. So far as the petition against the respondent was concerned, it had a chequered career. It was strenuously resisted by the respondent. One of its objections was that during the pendency of the petition, the petitioner having taken possession of a portion of the

premises from the Royal Printing Works it was no longer entitled to maintain the petition, as it ought to apply for eviction only on the ground that it required additional accommodation. The Rent Controller overruled this specific objection on the ground that the matter should be viewed as on the date on the petition for eviction and not in the light of subsequent events. He also found that the petitioner did not own any building of its own in the city for carrying on its business, that its business had expanded manifold since 1937, the turnover amounting to as much as about Rs. 69,00,000 (sixty-nine lakhs) for the year ended 31st March, 1963, and that, in the circumstances, the requirement by the landlord of the premises for carrying on its business was *bona fide*. An eviction order was passed and it was contested by the respondent in an appeal under the provisions of the Act. The appellate Court came to the opposite conclusion, reversed the order and remitted the petition for fresh disposal, directing the Controller to do so viewing the petition as one for eviction on the ground that the petitioner required additional accommodation for the purposes of its business. The appellate Court took the view that, as the petitioner, had during the pendency of the eviction petition, taken possession of a portion of the part of the premises in the occupation of the Royal Printing Works, this made a difference to the continued maintainability of the petition for eviction, but the petition could, nevertheless, be disposed of afresh regarding it as one for additional accomodation. On that view ,the appellate Court did not record its final opinion on the question of *bona fides* and requirement by the petitioner of the premises for carrying on its business. Against that order, the petitioner filed C.R.P. No. 465 of 1965 which was dismissed by Anantanarayanan, J., as he then was, on 19th March, 1965. The petition against the respondent was taken up again and allowed by a different Rent Controller on 16th June, 1965. He found that the premises Nos. 11-A-1 and 11-A-2 structurally constituted a single integral building and that the petitioner not owning any building for the purpose of its business in the city and its business having enormously expanded in recent years ,*bona fide* required additional accommodation for the purpose of its business. He felt that the hardship to the respondent would not outweigh the advantage that would accrue to the petitioner by the order, and ordered eviction. The Rent Controller carefully scrutinised the evidence on the question of *bona fides* and was of opinion that the petitioner was *bona fide* in its requirement of additional accommodation. The respondent appealed from that order and succeeded. Once again the appellate Court differed from the findings of the Rent Controller. It observed that it was not satisfied that there was really need for additional accommodation for the petitioner, as it was already in possession of rented premises in various places of a total extent of about 10,000 square feet. It thought that a general increase in the turnover by itself would not show that the petitioner was in need of additional accommodation. It was inclined to think that the petitioner purchased the premises as an investment or in the alternative, to demolish the building and construct a new one, and its object in seeking eviction was apparently to get a higher rent. Lastly, it was of opinion that it was difficult for the respondent to get alternative accommodation for its business and therefore the balance of advantage to the petitioner and the hardhsip to the respondent was in favour of the latter. The present petition is directed against this appellate order.

It is contended for the petitioner in this Court that the landlord's application for eviction was wrongly disposed of after the remit order as one under section 10 (3) (*c*) of the Act while it was originally one filed under section 10 (3) (*a*) (*iii*). Alternatively it is said that even on the footing that the petitioner required additional accommodation, the appellate authority failed to make the correct approach. On the other hand, for the respondent, it is urged that the petitioner having during the pendency of the eviction petition obtained an order of eviction against another tenant in a portion of the building and taken possession of a part of it, it could only succeed on satisfying the Court that it *bona fide* required the additional accommodation and the conditions of the proviso to section 10 (3) (*c*). On behalf of the respondent, attention is also invited to clause (ii) of the second proviso to sub-section 3 (*a*)

of section 10 and it is pressed upon me that once the landlord obtained possession of a part of the building, he would not be entitled to apply under section 10 (3) (*c*) (iii) of the Act.

In my view, the main contention for the petitioner is sound and should be accepted. The petition for eviction, as originally filed against the respondent, was clearly one under section 10 (3) (*a*) (iii). When it filed it, it was not in occupation of any part of the premises. It could, therefore, only apply for eviction under section 10 (3) (*a*) (iii). That provision enables a landlord to get an order of eviction on the ground that he is not in occupation of any other building of his own for the purpose of carrying on his business, and that he requires it for the purpose and that the requirement is *bona fide*. Once the landlord obtains possession of a building under this provision, he is debarred from applying again under that provision for obtaining possession of another non-residential building of his own. That is the only effect of clause (*ii*) of the second proviso to section 10 (3) (*a*). This is not a case where the petitioner has obtained possession of the whole or part of a non-residential building under section 10 (3) (a) (iii) and applied again under that very clause for eviction of a tenant from another non-residential building of its own. The various clauses of section 10 will have to be read and understood in the context of each other and a comparison of clause (*a*) and (*c*) of sub-section (3) of section 10 shows that clause (*c*) applies only where a landlord is already in occupation of a part of a building and requires additional accommodation. Clause (*a*) of sub-section (3) of section 10 covers a case of a landlord who is not in occupation of a building or part of it and requires it for his own occupation for the purpose of his residence or of carrying on his business. Clause (*ii*) of the second proviso to sub-section (3) (*a*) is inapplicable to a petition for eviction during the pendency of which the landlord takes possession of another building or a part of it by an independent petition, for, it is inappropriate to say that the landlord applies again under the same clause for eviction. In my opinion, if a landlord files separate eviction petitions against each of the tenants in a building and during the pendency of one, obtains possession of parts of the building from one or more of the tenants, who are respondents in other applications, by no stretch of imagination can it be said that the application, which remains to be disposed of, is one that has been filed again by the landlord within the meaning of the proviso. The proviso does not bar such a petition. Nor is there anything in the proviso of the rest of the provisions of sub-section (3) (*a*) or clause (*c*) of that sub-section to justify the view that on account of the fact that during the pendency of an eviction petition, possession of a part of the building has been taken, as a result of another eviction petition, the petition so pending should, for that reason, be viewed as one under section 10 (3) (*c*) for additional accommodation. On that view the petitioner must succeed.

But it is argued for the respondent that the contention is not open to the petitioner in view of the order of Anantanarayanan, J., in C.R.P. No. 465 of 1965. The learned Judge while disposing of the petition referred to the fact that the petitioner had taken possession of a portion of the premises from the Royal Printing Works and observed that in that case, the proceeding by virtue of the subsequent facts might well be considered as one under section 10 (3) (*c*) of Madras Act XVIII of 1960. The learned Judge, however, went on to observe:

> "The argument is that this provision does not apply, because the landlord took out comprehensive proceedings for eviction of all the tenants, originally. That, again, is an argument which could be raised in the Court of the learned Rent Controller. There is no ground for interference in revision with the judgment directing the remand, and the petition is dismissed."

The last observations show that the learned Judge did not decide the question but expressly left it open so that it could be raised before the Rent Controller. As I understand the order, the learned Judge was not inclined to interfere in revision with the order of remit but at the same time did not intend to conclude the point against the petitioner once and for all.

There is no dispute in this Court that the petitioner does not own any other building. The record clearly shows that it is in possession of rented space of a total extent of about 10,000 to 12,000 square feet. On the evidence on record, there is no doubt that the petitioner has been paying heavy rent. It is equally clear on the material available that the petitioner's business has expanded manifold. In the circumstances, there is no reason to suspect the *bonâ fides* of the petitioner. *bona fides* in the context have relevance to the honest requirement by a landlord of the premises he has purchased for the purpose of carrying on his business. No oblique purpose of the petitioner in seeking eviction is made out from the evidence. The petitioner is, therefore, entitled to an order of eviction under section 10 (3) (*a*) (iii)

In any case, I think the petitioner's alternative contention also has force. If the application for eviction is to be regarded as one under section 10 (3) (*c*), it seems to me that the occupation of a part of the building contemplated by that provision in its occupation of carrying on the business. There is no evidence on record that the petitioner has occupied any part of the premises in that sense. Assuming it has, I feel no doubt having regard to the great volume of the petitioner's business, it needs additional accommodation for the purposes of its business. On this matter, the Rent Controller has given very cogent and convincing reasons from which the lower appellate Court could not justifiably differ. On the proviso to clause (*c*), sub-section (3) of section 10 also, I think the Rent Controller's conclusion on the facts was the correct one.

The petition is allowed and the order of the Rent Controller dated 16th June, 1965, is restored. Each party will bear its or his costs throughout. Time for eviction six months.

S.V.J. — *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—MR. JUSTICE T. VENKATADRI.

G. M. A. Bhaimia, Muthavalli "Wakf Estate A. M. Bhaimia," and others .. *Petitioners**

v.

The Madras State Wakf Board represented by its Secretary and another .. *Respondents.*

Wakf Act (XXIX of 1954), sections 46 and 6—Wakf-alal-aulad—Right of State Wakf Board to claim contribution—Can be claimed only in respect of income set apart for religious, pious or charitable purposes—Determination of income for purposes of contribution—Expenses should be deducted—Scope of section 6.

Muhammadan Law—Wakf—Public and private wakfs—Distinction.

Under section 46 of the Wakf Act, 1954, the State Wakf Board has no jurisdiction either to claim, demand or collect contribution from the income of the properties in respect of a private wakf. The Board has only a limited jurisdiction to collect contribution only in respect of the income set apart for religious charitable and pious purposes. Thus when wakfs are created not only for the benefit of the settlor, his family and descendants but also for religious, charitable and pious purposes, the Board has jurisdiction to claim contribution only from the income of the properties set apart exclusively for pious, charitable and religious purposes. The State Wakf Board is not entitled to call upon the mutawallis to pay contribution from and out of the total income of the properties comprised in the wakf deed

*W.P. Nos. 289, 1278 to 1280, 1440 and 1514 of 1964
1411 and 4566 of 1965 and 196, 668 and 692 of 1964. 27th July, 1967.

irrespective of the fact that only a fraction of the estate or a share of the income is set apart for religious pious of charitable purposes.

Case law discussed.

Further the Wakf Board can claim contribution only from the net income afte deducting the expenses incurred for raising the income and after deducting any revenue, cess, rates and taxes payable to the Government or to any local authority.

The question whether the Wakf Board can claim contribution from the income from private wakf or wakf-alal-aulad would not fall within the purview of section 6 of the Wakf Act and hence that section would be no bar to the maintainability of a writ petition raising the aforesaid question.

[Nature of public and private wakfs discussed.]

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed with 289, 1278, 1440, 1514 of 1964, 1411 of 1965 and 196, 668 and 692 of 1964 on the file of the high Court, the High Court will be pleased to issue writs of *certiorari* calling for the records (1) relating to the order of the Respondent Board dated 4th January, 1964, and renewed by its demand dated 12th February, 1964, relating to the Wakf Estate of the petitioner in W.P. No. 289 of 1964, (2) relating to the demand notice dated 28th December, 1963 in D. Nos. 67, 82 and 123 of 1963 of the State Wakf Board respectively in W.P. Nos. 1278, 1279 and 1280 of 1964; (3) connected with W.B. No. MDS. 154/B3, dated 15th August, 1964, of the 2nd Respondent in W.P. No. 1440 of 1964; (4) relating to the Demand Notices dated 12th May, 1959 in A. 3/S.I.N/59 and No. 4113/59-A2, dated 16th March, 1964 in W.P. No. 1514 of 1964; (5) in W.B. A9/643 of 1964 relating to the Kajamiam Wakf, Tiruchirapalli and in particular its communication W.B. A9/643 of 1964 TRI dated 22nd March, 1965 enclosing the demand No. G.S. 643 D. No. 1 dated 19th March, 1965 in W.P. No. 1411 of 1965; (6) relating to the Board's Communication MDS. 68/B3 dated 24th January, 1964 in W.P. No. 196 of 1964; (7) relating to the Board's Communication Rc. 1252-64-B3 dated 10th April, 1964 in W.P. No. 668 of 1964 and (8) relating to the proceedings initiated by the order dated 1st February, 1964 in W.B. 64/Madras in W.P. No. 692 of 1964 and quash the said orders made therein, etc.

S. K. Ahmed Meeran, for *M. A. Ghatala* and *D. A. Bhaimia*, *M.A. Ghatala*, *V. Narayanaswami* and *K. R. Ramachandran*, *M.R. Krishnan*, *S. K. Ahmed Meeran* and *M. Khaja Mohideen*, *V. K. Thiruvenkatachari* for *A. R. Ramanathan*, *T. N.C. Srinivasa-varadachary*, and *Dolia of Aiyar & Dolia*, for Petitioners.

S. I. Samiullah, for *M. A. Sathar Sayeed*, *M. G. Dastagir*, *M. K. Nambyar* for *K.K. Venugopal*, *M. G. Dastagir* and *K. K. Nalini Vasudevan*, and *Amjad Nainar*, for Respondents.

The Court made the following

ORDER.—These petitions are filed by the Mutawallis of the various Wakf properties questioning the legality of the State Wakf Board claiming a certain percentage of contribution from the entire income of the Wakf properties, when only a portion of the income from such properties are set apart for religious, charitable or pious purposes. The petitioners are claiming relief by way of prohibition or *certiorari*, to forbear the Board from making its demand or to quash the notice issued by the State Wakf Board respectively.

In W.P. No. 289 of 1964, ten per cent of the income has been set apart for religious charitable and pious purposes. In W.P. No. 1278 of 1964, a certain portion of the income from and out of the wakf properties has been set apart for charitable purposes. So also in W.P. Nos. 1279 and 1280 of 1964. In W.P. No. 1440 of 1964, a Wakf has been created for the maintenance and support of the founder's family, children and descendants and a sum of Rs. 480 annually to certain charities, *viz.*, three mosques and to an Arabic College at Vaniyambadi. In W.P. No. 1514 of 1964, by a trust

deed the founder has set apart 10/16 share for the performance of charities and 6/16 share for his santhathis. In W.P. No. 1411 of 1965, the founder has set apart Rs. 2,200 for certain charities mentioned in the trust deed. In W.P. No. 4566 of 1965, a one -third share of the net income has been set apart for charities. In W.P. No. 196 of 1964 and W.P. No. 668 of 1964 and W.P. No. 692 of 1964 Wakfs are created for the maintenance support and benefit of the founders and their families and descendants, and in the event of the extinction of the descendants the wakf properties should be utilised for charitable purposes mentioned in the deed.

'Wakf' in Muslim Law means a permanent dedication by a Muslim of any property for any purpose recognised by Muslim Law as religious, pious and charitable. A wakf is created by mere declaration of endowment by the owner of the property, and upon such declaration the property immediately vests in God Almighty. There are two classes of Wakfs, public and private. In the case of a Public Wakf, the property, namely the corpus as well as the usufruct, vests in God, since the usufruct becomes immediately applicable to the enumerated holy purposes. In the case of Private Wakf or Wakf-alal-aulad, only the corpus of the property vests in God immediately, and the enjoyment of the usufruct is postponed till after the extinction of the Wakif, his family and descendants. A Public Wakf is one for religious, pious and charitable purposes; and a Private Wakf is one for the benefit of the settlor's family and descendants. Such a private wakf was made legal and valid under Muslim Law by the Musselman Wakf Validating Act of 1913.

The contention of the petitioners is that the State Wakf Board has no jurisdiction either to claim, demand or collect contribution form the income of the properties in respect of a Private Wakf of Wakf-alal-aulad. The Board has got only a limited jurisdiction to claim contribution, *i.e.*, it can collect contribution only in respect of the income set apart for religious, pious and charitable purposes. The petitioners contend that the section itself makes this clear, for, section 3 (1) (iii) includes a Wakf-alal-aulad to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable. Thus the contention of the petitioners is that in the case of composite Wakfs, *i.e.*, wherever wakfs are created not only for the benefit of the settlor, his family and descendants but also for religious, charitable and pious purposes, the Board can claim contribution only from the shae of the properties which are exclusively set apart for religious, charitable and pious purposes and that in the case of Wakf simpliciter the Board has no jurisdiction to claim or demand contribution from its income.

But the State Wakf Board contends that it has got jurisdiction wherever a wakf is created, no matter whether it is public or private wakf (Wakf-alal-aulad). Under Muslim Law, there is no such distinction between Public and Private Wakfs The Muslim Law treats both Public and Private Wakfs alike, the moment a wakf is created and registered, and therefore the Board has got jurisdiction to demand contribution. According to the Board, the properties comprised in the wakf deed are permanently dedicated and the creator of the wakf has relinquished all his rights of ownership and the designated persons are only the Mutawallis who have no manner of right to sell or mortgage or in any way transfer or charge the wakf properties. The Wakf has tied down the properties and the properties are vested in God, and on account of the express dedication, the entire properties have become wakf properties, though in the case of private wakf, *i.e.*, Wakf-alal-aulad, the charitable, religious and pious purposes are only postponed until after the happening of the contingency namely the extinction of the founder's family; but the character of the property is not changed. According to the Wakf Board, the entire properties are dedicated permanently and even assuming that the income is dedicated for the benefit of the founder's children and descendants, that is also a pious and charitable purpose. Wakf-alal-aulad contemplates that, after the extinction of the males and females in the founder's family, the income from the properties should go to pious and charitable purposes. Therefore the Board is interested in seeing that the properties of Wakf-alal-aulad are kept in tact till the extinction of the founder's family, so that the

charities mentioned in the Wakf could be performed on the extinction of family and descendants of the founder. It is, therefore, contended that the Board has got jurisdiction over the same, and that the Wakf Board has been formed only to safeguard the interest of the Wakfs and their properties, and that in accordance with section 46 of the Wakf Act, 1954, every Mutawalli should pay annually to the Board such contribution not exceeding six per cent. of the net annual income of such of its property as is situate in the Madras State.

There is, thus, an acute controversy between the petitioners and the Wakf Board in regard to the payment of contribution from the income of the wakf properties. In short, the controversy between the Mutawallis and the Wakf Board is that, while the Mutawallis are contending that they will pay only contribution proportionate to the incom from the properties which have been set apart for pious, religious or charitable purposes and that where properties are dedicated completely for the benefit of the settlor and his family and descendants they will not pay any contribution, the contention of the State Wakf Board is that contribution should be paid to the Board on the total income of the properties and should be paid even where the properties are initially dedicated to the settlors' family and descendants.

The question that arises for consideration in these petitions is whether the State Wakf Board is entitled to call upon the Mutawallis to pay contribution from and out of the total income of the properties comprised in the Wakf deed irrespective of the fact that only a fraction of the estate or a share of the income is set apart for religious, pious or charitable purposes.

Historically, the origin of Wakf is attributed to the direct prescriptions of the Prophet. The validity of Wakf is founded on the rule laid down by the Prophet himself who declared, 'Tie up the property and devote the usufruct to human beings and it is not to be sold or made the subject of gift or inheritance, devote its produce to your children, your kindred and the poor in the way of God'. This doctrine has been given due recognition and proper place from the time of the Muslim system of jurisprudence, and the law relating to endowments by far the major branch of Muslim law has come into vogue. The pronouncements of the Prophet, which are the origin of wakf gave rise to a good superstructure which the jurists moulded in the different Muslim countries, according to their needs and circumstances, social conditions and conceptions of public policy. The doctrine of Wakf is, therefore, interwoven with the entire religious life and social economy of the Muslims. The Muslim Law imposes an obligation, legal or moral, to provide for the upkeep and maintenance of parents, descendants and kinsfolk in general; and provision for one's own self has been considered equally obligatory, so that one may never become a burden to his society or people. The subsequent conflict and controversy between the Muslim jurists gave rise to the bulk of modern Anglo-Muslim case-law on the subject. It is pertinent to quote the observations of Sir Roland Wilson as extracted in Saksena's Muslim Law, Fourth Edition, at page 464 :

> "Trouble arose when case after case raised the question whether the term wakf was also meant to cover disposition in the nature of *en tail* or private settlement. On the one side, it was urged that to admit the validity of such private perpetuities would be contrary to the spirit of the Muslim Law of gifts, and inconsistent with the jealous watchfulness displayed in other ways against any attempt to evade the rules of inheritance. The religious and charitable perpetuities, which were undisputed, were not explained. On the other side, it was pointed out that the practice in question is expressly recognised in all the standard text-books except one, which is not adverse, but simply silent, and that in the view of the Prophet to provide for the comfort and dignity of one's own family is quite as much an act of piety, quite as genuine a form of alms-giving, as to provide for the poor in general."

Thus there was a good deal of controversy whether a Wakf in favour of the settlor and his family is valid in Muslim Law, and in 1894 the Privy Council expressed in *Abdul*

Fata Mahomed v. *Rasamaya*[1], that, if the primary object of the wakf was the aggrandisement of the family, and the gift to charity was illusory whether from the smallness of the amount or from its uncertainty or remoteness, the wakf for the benefit of the family was invalid and no effect could be given to it. This decision of the Privy Council raised considerable alarm and caused considerable dissatisfaction in the Muslim Community in India. A representation was thereupon made to the Government of India which caused the passing of the enactment known as the Mussalman Wakf Validating Act, 1913. By the 1930 Act, it was made to apply retrospectively.

As already stated by me, Wakfs can now be divided into two classes (1) Public and (2) Private. Private Wakfs may again be sub-divided into Wakfs exclusively for the benefit of the settlor's family and descendants in perpetuities and wakfs for the benefit of the settlor's family and descendants and also for charitable and religious purposes. The private wakfs are called Wakf-alal-aulad. For the protection, enforcement and administration of the Wakfs, there have been enactments passed from time to time both by the Central and State Governments, and finally the Wakf Act, 1954 was passed for the better administration and supervision of wakfs and to prevent mismanagement of wakf properties set apart for religious, pious and charitable purposes. One of the distinctive features of the Act is that it contains a promise of funds to finance schemes of educational, social and economic advancement. The Central Act gives the State Wakf Boards a more positive role in organising constructive programmes and thus transform the Boards from mere instruments of administrative supervision to creative organs for educational, social, economic and cultural renaissance. The contribution chargeable under the Act is upto six per cent of the gross income of a Wakf less cess, rates and taxes payable to Government or a local authority. The State Wakf Board was formed in February, 1958. Now in the course of implementation of the Act, the Wakf Board is calling upon the Mutawallis of the petitioners—wakfs to pay the contribution from and out of the total income of the estates.

Section 3 (1) of the Act (XXIX of 1954) defines 'wakf' as the permanent dedication by a person professing Islam of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable, and includes a wakf-alal-aulad to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable. Thus the definition recognises both public and private wakfs. The State Board therefore, contends that it is clothed with the power to call upon the Mutawallis of these Wakfs to pay contribution irrespective of whether it is a public or a private wakf. The Board contends that the wakf itself provides for himself and his family, and even giving maintenance to his family or himself is regarded in Muslim law as a *sadaqah* which is regarded as a pious act. The Board reminds that the Prophet himself has declared that a pious offering to one's family is more pious than giving alms to beggars and that the best of all pious offerings is a provision for one's self, so that one may not fall into need and the giving of *sadaqah* should commence with those whose subsistence is obligatory. It also reminds that support to one's self, his children and family is the first duty and necessity, that a man giving subsistence to his family is giving *sadaqah* and that giving alms to the poor has ward of one alms, but that giving to kindered has two rewards. In other words, the Board contends that there can be no distinction or discrimination between public and private wakfs and that wherever a wakf is created it can come within the jurisdiction of the Board in regard to the management and supervision of the estates comprised in the wakf deed. The Board must be guided by the notions of Mohammaden Law. Such a contention came up for consideration in *Kawsar Alam* v. *State of West Bengal*[2], where a substantial portion of the income of wakf property was permanently dedicated for religious an dcharitable purposes and the deed also allotted substantial portion of income for payment of allowances to Wakf's descendants in perpetuity. The Special Division Bench of the Calcutta High Court observed :

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1. (1895) I.L.R. 22 Cal. 619.
2. A.I.R. 1962 Cal. 468 at 471 and 472.

"Nowadays a Wakf-alal-aulad is commonly regarded as a private trust and not as a trust for religious and charitable purposes................

......the provisions in the wakf deed for payment of allowances to the testator's descendants are not for religious or charitable purposes."

When this case went to the Supreme Court, their Lordships observed in *Fazul Rabbi* v. *State of West Bengal*[1].

"No religious worship, teaching or service or performance of religious rites is involved when the wakf provides for his family or himself even though a person giving maintenance to his family or himself is regarded in Mahomadan Law as giving a *sadaqah*. But even if regarded as a pious act a *sadaqah* of this kind is not a religious worship or rite."

Their Lordships also quoted the observations of Lord Hobhouse in *Abdul Fata Mahomed* v. *Rasamaya*[2]:

".... it would be doing wrong to the great law giver to suppose that he is thereby commending gifts for which the donor exercises no self-denial, in which he takes back with one hand what he appears to put away with the other; which are to form the centre of attraction for accumulations of income and further accessions of family property; which carefully protected so-called managers from being called to account; which seek to give to the donors and their family the enjoyment of property free from all liability to creditors; and which do not seek the benefit of others beyond the use of empty words."

After extracting the above observations, their Lordships observed :

"But the intention of the validating Act was not to give a new meaning to the word 'charity' which in common parlance is a word denoting a giving to someone in necessitous circumstances and in law giving for public good. A private gift to one's own self or kith and kin may be meritorious and pious but is not a charity in the legal sense and the Courts in India have never regarded such gifts as for religious or charitable purposes even under the Mahomedan Law."

Their Lordships of the Supreme Court in *Mohd. Ismail* v. *Sabir Ali*[3], have observed that where a wakf deed provides for an insignificant portion of the income to be used for certain religious purposes, such a wakf though in theory it vests as the property of God Almighty, is not for charitable or religious purposes.

Our own High Court in *Ramanadham Chettiar* v. *Vada Lavvai Marakayar*[4], has observed that aggrandisement of the donor's family or protection from poverty of the donor's descendants without any limit of time is not a charitable and pious purpose as contemplated by the Mahomedan Law of wakfs, and a gift for the benefit of one's own family, relatives or descendants is not charitable nor pious within the meaning of the law of wakfs. In *Income-tax Commissioner* v. *Jamal Mohamed*[5], this Court has held that a provision in the wakf deed for the maintenance, education, marriage, funeral and other necessities of the poor and needy among the descendants of the wakif in the male line cannot be said to constitute a trust for general public utility and that the trust being clearly of a private nature, the income allotted under the wakf deed for the purposes mentioned therein which remains unspent for want of beneficiaries is assessable in the hands of the mutawalli. Venkataraman, J., in *Mohamed Mahin* v. *Madras State Wakf Board*[6], has observed that a settlement both for the benefit of the persons mentioned therein and charitable acts mentioned therein will plainly be a wakf-alal-aulad within the meaning of section 3 (1) (iii) of Act XXIX of 1964, and that it will be a wakf for the purpose of the control of

1. (1965) 3 S.C.R. 307 : (1965) 2 S.C.J. 833: A.I.R. 1965 S.C. 1722 at 1726.
2. (1895) I.L.R. 22 Cal. 619 at 632.
3. (1963) 1 S.C.R. 20 : A.I.R. 1962 S.C. 1722.
4. (1910) 20 M.L.J. 254 : (1911) I.L.R. 34 Mad. 12 at 16.
5. I.L.R. (1941) Mad. 862 : (1941) 2 M.L.J. 148 : A.I.R. 1941 Mad. 535.
6. (1967) 1 M.L.J. 65 at 74.

the Wakf Board to the extent to which the properties have been dedicated for the religious and charitable acts. This is the case-law on the subject.

Now turning to Act XXIX of 1954, we will see whether the Wakf Board has got jurisdiction to call upon the Mutawalli of a private wakf or wakf-al al-aulad to pay contribution to the Board. I am convinced on the review of authoritative case-law and on the provisions of the Act that the Board has got jurisdiction to claim contribution only from the income of the properties set apart exclusively for pious, charitable and religious purposes. The Act itself makes the position clear as between public and private wakf or wakf-alal-aulad and the Board can claim contribution only to the extent to which the properties have been dedicated for any purpose recognised by Muslim Law as pious, religious or charitable. Section 32 (2) directs that a Mutawalli of a wakf shall prepare and furnish to the Board a full and true statement of accounts. It means that he should mention the amount spent for pious, charitable and religious purposes. The intention of the Legislature is, therefore, to confer jurisdiction on the Board to claim contribution in respect of the income from the estate of wakf-alal-aulad which is set apart for purely pious, charitable and religious purposes. The State Wakf Board may, with the best of intentions, resort to enhance the wakf funds, in order to devote and utilise the funds for welfare objects. But the Board, cannot, on that account, under the guise of the historical theory of wakfs under the Mohamedan Law, demand or claim or collect contribution from the mutuwallis of private wakfs simpliciter, *i.e.*, where properties are solely dedicated for the benefit of the settlor and his descendants. Even in the case of composite wakfs created for the benefit of the family and descendants and for pious, charitable and religious purposes, the Board can claim contribution only in respect of the income from properties set apart for pious, religious and charitable purposes in the wakf deed.

It is next contended by the petitioners that the wakf Board has no jurisdiction to collect contribution from the income of the wakf properties without deducting the expenses in raising the income from these properties. In one case the wakf has got about 37½ acres of land for which cultivation expenses are partly paid in grain and partly in cash. The contention of the petitioners' Counsel is that the Wakf Board cannot claim contribution from and out of the total income without deducting the expenses. Under section 46 of the Act, the mutawalli of every wakf should pay contribution to the Board not exceeding six per cent. of the net annual income of such of its property. 'Net income' is defined in section 3 (*g*) as the total income less any revenue, cess, rates and taxes payable to the Government or any local authority. It does not mean that the mutawalli is not entitled to deduct the expenses actually incurred by him in raising the income from the immovable properties. The definition of 'net income' which means 'total income' has to be understood and interpreted according to the expression used in the Indian Income-tax Act. The Madras Hindu Religious and Charitable Endowments Act also levies contribution which is a percentage of the income after excluding expenses incurred for raising its income. Learned Counsel further contends that the expression 'total income' has been used in the Act in the sense of the ordinary concept of income, *i.e.*, what is left after expenses for earning the same. He, therefore, contends that 'total income' would only mean, income after deducting expenses for raising that income besides cess, rates and taxes payable to Government or local authority. I entirely agree with learned Counsel. In this connection, learned Counsel for the petitioners cited a direct case on the point *Md. Ibrahim Hossan Sait* v. *Kerala Wakf Board*[1], where the Bench had to interpret the words 'net annual income.' The Bench held that the total income in section 3 (*g*) of the Act is an income exclusive of the expenses of cultivation and net income under the section is the said total income minus the revenue, cess, rates and taxes payable to the Government or any local authority. It is also useful to refer to the observations of their

1. (1964) K.L.T. 367 : (1964) K.L.J. 435 : (1964) 2 I.T.J. 352 : A.I.R. 1964 Ker. 310.

Lordships of the Supreme Court in *Navnit Lal* v. *I. T. Appellate Assistant Commissioner*[1], namely that the word 'income' must be given its ordinary, natural and grammatical meaning and that income is a thing that comes in. Under these circumstances, the Board cannot claim contribution from mutawalli without deducting the expenses incurred by him for raising the income from the immovable properties and without, of course, deducting the cess, rates and taxes payable to the Government or any local authority, as defined in section 3 (*g*) of the Act. That would be the income defined in the Act as 'net income.'

Another contention put forward for the State Wakf Board is that these writ petitions are not maintainable, since the mutawallis can file suits for declaration as provided in the Act questioning whether particular property is wakf property or not. No doubt, on the face of it, this argument may be impressive. But on a closer scrutiny of the case and analysis of the facts, it is clear that the petitioners herein are not questioning the character of the properties comprised in the wakf deeds. All the petitioners concede that these properties are wakf properties. But what is raised for consideration is whether the Board can claim contribution from the income from private wakf or wakf-alal-aulad which has been recognised by enactments in this country. Under these circumstances, section 6 cannot and will not come into play.

The result will be that the State Wakf Board will have no jurisdiction either to claim, demand or collect contribution from and out of the total income of the properties comprised in the wakf-alal-aulad. But the Board will have jurisdiction to collect or demand contribution from and out of the income set apart exclusively for pious, religious and charitable purposes in the Wakf-alal-aulad. Further the Board can claim contribution only from the net income of such properties after deducting the expenses incurred for raising the income and after deducting any revenue, cess, rates and taxes payable to the Government or to any local authority.

The writ petitions are allowed. There will be no order as to costs.

V.K. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE A. ALAGIRISWAMI.

Guruswami Nadar and others .. *Appellants**

v.

Ezhumalai Panchayat Board, through its President and others .. *Respondents.*

Madras Village Panchayats Act (*X of* 1950), *section* 58—*Madras Panchayat Act* (*XXXV of* 1958), *section* 83—*Constitution of India* (1950), *Article* 265, *Schedule VII, List II, Entry* 52 *and List I, Entry* 89—*Levy of tax on articles brought in or taken out of the village based on customary collection called Mahamai or tharagu—Validity and legality of.*

A Panchayat Board levied a tax in respect of specified items of goods and articles brought into the village and certain other articles taken out of the village for the purposes of trade. When the levy was questioned by way of a suit, it was contended for the panchayat that the levy was valid as it was based on custom among the village community to make a collection called Mahamai or tharagu in respect of such goods.

Held, that, in respect of goods taken out of the limits of the Panchayat Board for purposes of trade, even the State Legislature has no power to levy a tax. It is, therefore, not possible for the State Legislature either to permit the levy of

1. (1965) 2 Comp.L.J. 1: (1965) 2 I.T.J. 1: A.I.R. 1965 S.C. 1375 at 1380. (1965) 2 S.C.J. 160: (1965) 1 S.C.R. 909:

*S.A. No. 1594 of 1963. 1st August, 1967.

such a tax by the Panchayat Board or to validate the levy of such a tax by the Panchayat Board.

The levy of the kind in question can be contemplated only on the ground of its being related to the holding of some land or the holding of some office or at least some convenience or facility provided by a landholder. A mere custom, unrelated to anything else by which the village community makes collections in respect of goods brought for sale within its limits or goods taken out of its limits for sale outside cannot be said to be valid. There is no constitutional or legal basis for such a levy. Such a levy would be valid only if it is an incident of the possession of any property or holding of any office.

Appeal against the Decree of the District Court, Madurai, in A.S. No. 137 of 1961 preferred against the Decree of the District Munsif of Tirumangalam in O.S. No. 66 of 1960.

T. R. Mani and *T. Martin*, for Appellants.

S. Palaniswamy, S. K. Rajavelu and *A. Narayanaswami*, for Respondents.

The Court delivered the following

JUDGMENT.—Can the legality of a levy, which is in reality a tax, be upheld on the basis of a custom is the question for decision in this case. In the village of Elumalai in Madurai district for over 30 years it has been customary for the village community to make a collection called mahamai or tharagu in respect of certain articles brought into the village and certain other articles taken out of the village. The Panchayat Board of Elumalai passed a resolution on 16th December, 1958 and levied a tax in respect of seven items of goods and articles brought into the village and certain other articles which were taken out of the village for purposes of the trade. The plaintiffs filed the suit, out of which the present appeal arises, questioning the levy. The first defendant Panchayat Board and the other defendants who were the lessees for collection of this levy, contested the suit claiming that the levy in question was valid on the basis of custom which had been given legal effect to by section 58 of the Madras Village Panchayats Act, 1950. The trial Court held that the mahamai fund is, in fact, administered for the benefit of the villagers in common, that the lease of the mahamai collections has been going on for over 35 years and the collection has been going on for over 30 or 40 years and that the payment is not voluntary, but compulsory. Before the lower appellate Court, there was no dispute about the facts. The only question at issue was whether the levy was valid.

As already mentioned, the validity of the levy was sought to be supported on the basis of section 58 of the Madras Village Panchayats Act, 1950. Section 58 reads as follows:

"58. Any property or income which by custom belongs to, or has been administered for the benefit of, the villagers in common, or the holders in common of village land generally or of lands of particular description or of lands under a particular source of irrigation shall vest in the Panchayat and be administered by it for the benefit of the villagers or holders aforesaid."

It follows from the findings of the Courts below that this is an income which by custom belongs to or has been administered for the benefit of the villagers in common. But this levy being compulsory there is very little doubt, that it is in effect a tax. Under Article 265 of the Constitution of India no tax shall be levied or collected except by authority of law. Now, is section 58 of the Madras Village Panchayats Act of 1950, the law, which authorises the levy and collection of the tax in question and if it does, is it valid?

It is obvious that the State Legislature has no power to permit a local body or to enable that local body to levy a tax which is not included in the State List in the Constitution. In List II of Schedule VII to the Constitution of India, Entry 52 is as follows:

"Taxes on the entry of goods into a local area for consumption, use or sale therein.".

Entry 89 in List I of the same schedule is "terminal taxes on goods or passengers, carried by railway, sea or air; taxes on railway fares and freights." The goods in this case are not carried by railway or sea or air and therefore, Entry 89 of List I to Schedule VII is not relevant. The only entry which is relevant is Entry 52 of the List II of Schedule VII.

Now the resolution in question purports to levy a tax not merely on goods brought into the jurisdiction of the Panchayat Board from outside and sold there, but also on agricultural produce and skins of goat and sheep taken out of the village for purposes of trade. In respect of goods taken out of the limits of the Panchayat Board for purposes of trade, even the State Legislature has no power to levy a tax. It is, therefore, not possible for the State Legislature either to permit the levy of such a tax by the Panchayat Board or to validate the levy of such a tax by the Panchayat Board. So, we have to consider only the validity of the levy only in so far as it is in respect of goods brought into the Panchayat Board limits for purposes of trade.

If the effect of section 58 of the Act is to recognise the right to levy such a tax and to sanction it, then the resolution of the Panchayat Board in question would be valid; otherwise not. Section 58 occurs in Chapter III of the Madras Village Panchayats Act, 1950 under the heading "Functions, Powers and Property of Panchayats." Chapter IV deals with taxation and finance. Section 63 found in Chapter IV enables every Panchayat to levy in the village a house tax, a profession tax and a vehicle tax. It also enables a duty to be levied on certain transfers of property. Under sub-section (3) of that section, the Panchayat may also levy in a village, subject to such rules as may be prescribed and with sanction of the Inspector and subject to such restrictions and conditions, if any, as may be imposed by him either at the time of granting sanction or later, a fee on any commercial crop bought and sold in the village, not being a crop on which fees are levied in the village by a market committee under section 11 of the Madras Commercial Crops Markets Act, 1933. It is not contended that the levy in question comes under section 63.

It may also be mentioned that in the bill as published, which later became the Madras Village Panchayats Act, the clause corresponding to present section 58 is clause 59. In the statement of objects and reasons accompanying it, it is mentioned that the Panchayats are to levy a house tax, a profession tax and a vehicle tax and with the sanction of the Inspector of Municipal Councils and local Boards, a case on the entry of goods into the village for consumption, use or sale therein. The last item would be directly under Entry 52 of List 2 of Schedule VII to the Constitution. This statement in the Statement of Objects and Reasons, is given effect to by section 63. There is no reference to clause 59 in the Statement of Objects and Reasons. Though the fact that section 58 finds a place in Chapter III relating to functions, powers and property of Panchayats, and not in the Chapter IV relating to the taxation and finance, that by itself would not conclude the question whether the levy is a permitted item of tax.

Now income may be from any source. Income may be from property or it may be from taxes. In Stroud's Judicial Dictionary 'income' is mentioned as signifying whatever comes in and that it is as large a word as can be used, to denote a person's receipts. But merely because the word 'income' finds a place in section 58, it may not mean that it would include taxes also. Nor would it exclude an income from taxes. But in the context of the occurrence of section 58 in Chapter III relating to property and the fact that section 58 itself mentions "any property or income" it may be said to show that the income therein referred to is income from property, which does not belong to the villagers in common. For instance, the irrigation tanks vest in the Government. But in many villages the fishery rights belong to the village community or to holders of the lands, under the ayacut of the irrigation tank. There may be cases where there are customary rights of grazing

on the lands. This would vest in Government as poramboke. But the village community might be getting an income from such grazing on the lands. That it is apparently such income that was contemplated would be clear from the fact that section 83 of the Madras Panchayats Act, 1958 reads as follows:

"Any property or *income including any fishery right* which by custom belongs to or has been administered for the common benefit of the inhabitants of the village or town, or of the holders in common of village land generally or of the holders of lands of a particular source of irrigation shall, if so, declared by the Government, vest in the Panchayat and, be administered by it for the benefit of the inhabitants or holders aforesaid."

It would be noticed that after the words 'any property or income" found in section 58 of the 1950 Act, the words "including any fishery right" have been newly added. Those words of inclusion would not mean that the general word "income" preceding them are restricted in any way. In the context of the mention of fishery rights which is merely illustrative I should think that when section 58 mentions 'income' it can only refer to income from sources other than property belonging to the Panchayat and particularly income from property which was not owned by the village community.

The question whether the levy in the nature of tax can be supported on the basis of custom has come to be considered more than once. The general result of those decisions may be shortly stated thus. Such a levy would be valid only if it is an incident of the possession of any property or holding of any office. In *Siripdrapu Ramannav* v. *Mallikarjuna Prasada Naidu*[1], the fee claimed by the landlord was the fee payable to Sivaganga goddess and it was observed by a Bench consisting of Muthuswami Iyer and Best, JJ., thus (at page 45):

"A duty to contribute to the expense of a temple is not an ordinary incident of the relation of landlord and tenant, nor has it any connexion with the jirayati tenure on which the ryot holds his land. *Prima facie* the contribution is voluntary, and unless the fee is shown to be a charge on the land it cannot be treated as a payment which the zamindar can illegally compel the ryot to make."

In *Ramalinga Chettiar* v. *Ramaswami Iyer*[2], Tiruppani cess for the purposes of repairing certain buildings dedicated for charitable purposes was held to be one of an essentially voluntary character, and that therefore, its payment for a number of years cannot be a ground for implying that there was a legal contract or obligation to continue to pay it. In *Venkatasubbanna* v. *Raja Yachandrulu*[3], a Bench of this Court held that the levy by a zamindar of a cess called "Piratlavaru" a cess intended to provide maintenance for the zamindar's purohit was not valid, though the defendant admitted that he and the other ryots have been paying the cess for a long time.

The most important decision that has dealt with this question is the one reported in *Gopala* v. *State of Madras*[4], decided by this Court. There the levy of land revenue on ryotwari lands was challenged as not having any statutory sanction behind it and therefore as contravening Article 265 of the Constitution. The Bench dealt elaborately with this question and held that the assessment of land revenue is valid on the ground that it is one of the prerogatives of the sovereign in this country. The assessment of land revenue was also held valid because of the Revenue Recovery Act (II of 1864). Section 3 of that Act is as follows:

"Every landholder shall pay to the Collector, or other officer empowered by him to receive it, the revenue due upon his land on or before the day on which it falls due according to the kistbandi or other engagement, and where no particular day is fixed, then within the time when the payment falls due according to legal usage; provided that except where property is held under a Sanad-i-Milki-yat-i-istimrar or other similar instrument it shall be lawful for the Board of

1. I.L.R. (1894) 17 Mad. 43 : (1893) 3 M.L.J. 207.
2. (1902) 13 M.L.J. 379.
3. (1909) 19 M.L.J. 273 : (1909) 3 I.C. 610.
4. (1958) 2 M.L.J. 117: 71 L.W. 672: I.L.R (1958) Mad. 798.

Revenue by notification published in the District Gazette, to alter and fix from time to time, the amount of the several kists or instalments, and the dates at which they shall respectively become payable".

The Bench interpreted this section as being a charging section providing for declaration of liability and also the recovery of the assessment leaving the actual assessment itself to the Board of Revenue. The Bench also referred to the fact that a number of other statutes in Madras like the Madras Local Boards Act, 1920, Madras Act XXVI of 1948, Madras Act XXIV of 1954 and Act XXX of 1955, have recognised the ryotwari assessment. They also held that the assessment can be upheld on the basis that the law referred to in Article 265 of the Constitution refers not only to statute law alone, but also to common law and that unless there is some provision in the Constitution which makes ryotwari assessment illegal, the law that previously existed in regard to it will continue to be valid even after the Constitution. They concluded the discussion by saying that though in origin the assessment was on the basis of a prerogative right it was recognised as lawful by custom and statute, the assessment procedure was codified, as it were, in the Board Standing Orders, and there was, therefore, a valid legal sanction prior to the Constitution for the levy, assessment and recovery of land revenue. It would thus be seen that the levy of land revenue was upheld not on the basis of custom, but on the basis of a number of considerations, not the least of which was the statutory basis provided by section 3 of the Revenue Recovery Act II of 1864. The decision relied upon by the respondent in *Radhaprasad* v. *Missor*[1], is really not one which upholds a tax on the basis of custom. The relevant portion in the judgment at page 389 is as follows:

"There was no dispute that it had been in existence from at least 1865. It would be difficult to say that a custom that prevailed for so long was contrary to public policy. It is only in exceptional cases that it is possible to say that a custom is unreasonable, because the fact that it has prevailed for a very long time raises a strong presumption that it is reasonable and after all the custom under which proprietors in India are encouraged to establish markets originate for the convenience of the people, if they were not entitled to realise some sort of dues not realisable from the holders of ordinary houses or lands, we would not find zamindars establishing markets for the convenience of the people. That is an established custom and in the absence of public bodies all over the country for establishing markets, there is no reason why the custom should not continue."

Thus, the levy in that case was related to the establishment of a market and the sale of goods in the market belonging to the zamindar. A review of all the decisions relating to the subject will, thus, show that the levy of the kind now in question can be contemplated only on the ground of its being related to the holding of some land or the holding of some office or at least some convenience or facility provided by a landholder. A mere custom, unrelated to anything else by which the village community makes collections in respect of goods brought for the sale within its limits or goods taken out of its limits for sale outside cannot be said to be valid. There is no constitutional or legal basis for such a levy. The following decisions relied on by the respondents *State of Madras* v. *S. S. M. Paripalana Sangam*[2], *Bari w/o Rajeswar* v. *Tukaram*[3], *Sobhnath* v. *Ambika Prasad*[4], and *Baba Narayan* v. *Samboosa*[5] do not really help them. They are all decisions relating to customs which conferred rights on individuals or members of certain communities which are either in the nature of easement or customary rights conferred on a large body of persons which are not in the nature of easements. None of them refers to a right to levy a tax.

1. A.I.R. 1918 Pat. 388.
2. (1961) 2 M.L.J. 231 : A.I.R. 1962 Mad. 48.
3. A.I.R. 1959 Bom. 54.
4. A.I.R. 1958 All. 419.
5. (1943) 2 M.L.J. 186 : A.I.R. 1943 P.C. 111.

In the result, the second appeal is allowed and the plaintiff's suit will stand decreed. As the question in this case is one of considerable difficulty and doubt, the parties will bear their own costs throughout. Leave granted.

S.V.J. —— *Second appeal allowed; Leave granted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. M. ANANTANARAYANAN, *Chief Justice* AND MR. JUSTICE M. NATESAN.

Loganathan (minor) and another .. *Appellants**

v.

Ponnuswami Naicker and others .. *Respondents.*

Contract Act (IX of 1872), section 23—Agreements to stifle prosecutions—Promissory note executed during pendency of criminal prosecution—Inference that the security was intended to stifle the pending prosecution—If and when permissible.

Hindu Law—Debts—Pious obligation of son to discharge father's non Avyavaharika *debts—Scope.*

Agreements for stifling prosecutions are well known classes of agreements which the Court refuses to interfere as falling under section 23 of the Contract Act. It is based on the principle that no man shall trade on felony. If the accused person is innocent, the law is abused for the purpose of extortion, and if he is guilty in fact, the law is eluded by a corrupt compromise screening the criminal for a consideration.

It is true in the present case that a promissory note was executed by the promisor while a criminal prosecution at the instance of the promisee was pending. But before the inference that the promissory note was intended to stifle the pending prosecution could be drawn, the dropping of the criminal prosecution must at least be a part of the consideration for the promissory note.

The test is, did the dropping of the criminal prosecution form a part of the bargain for the agreement or giving of the promissory note. The giving up of the prosecution need not necessarily be the sole consideration. There may be an antecedent obligation. It is enough if while giving security for the antecedent obligation the dropping of the criminal prosecution is made a part of the bargain.

When there is no pre-existing obligation, the inference that the security or note was given in consideration of dropping the prosecution may in a given case be patent. But when there is a pre-existing legal obligation and the security or note is given for it, it must be made out from the evidence. True, the evidence will normally be circumstantial and it may be by necessary implication that it is a part of the consideration to drop the criminal proceedings.

The promisee's subsequent attitude or his motive in not proceeding further with the prosecution after launching it will not render the promissory note unenforceable if withdrawal of the prosecution was not a part of the bargain.

In the present case the circumstances are not so clinching as to necessarily warrant the inference that it is a part of the bargain when the promissory note was executed that the criminal prosecution should not be proceeded with. It is not made out in the evidence that the promisor was even aware of the fact that a criminal complaint had been filed by the promisee and was pending when he executed the promissory note. Unless he is aware of the pendency of the criminal proceedings, withdrawal of the same cannot be held to form part of the consideration for the promissory note.

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* L.P.A. No. 3 of 1964. 23rd January, 1967.

Under the Hindu law a son is under a pious obligation to discharge his father's debts out of his ancestral property even if he had not been benefitted by the debts, provided the debts are not *Avyavaharika*. Colebrooke's transalation of the expression *Avyavaharika* as meaning "debts for a cause repugnant to good morals," has been generally accepted as the nearest approach to the true conception of the term. The sons get exonerated from their obligation to discharge the debt of their father from the family assets only if the debt was one tainted with immorality or illegality. The duty that is cast upon the son being religious and moral, the liability of the son for the debt must be exam'ned with reference to its character when the debt was first incurred. If at the orig'n there was nothing illegal or repugnant to good morals, the subsequent dishonesty of the father in not discharging his obligation will not absolve the son from his liability for the debt.

Case-law discussed.

Appeal under clause 15 of the Letters Patent against the Judgment and Decree of the Honourable Mr. Justice Venkatadri dated 9th December, 1963 and passed in A.S. No. 377 of 1960 preferred against the decree of the Court of the Subordinate Judge of Coimbatore, in O.S. No. 238 of 1958.

S. Rajagopalan, P. R. Gokulakrishnan and *S. Jayakumar*, for Appellants.

M/s. Aiyar & Dolia for *O. Rangarajan* and *K. Chandrasekaran*, for Respondents.

The Judgment of the Court was delivered by

Natesan, J.—This is an appeal under the Letters Patent from the decision of our learned brother Venkatadri, J., confirming the judgment of the Court of the first instance. Plaintiffs 1 and 2 are the appellants. The facts of the case are within a narrow compass. The suit statedly one for partition is in fact and substance an attempt by a Hindu son to free his share in the family properties from a debt incurred by his father. Defendants 1 and 2 in the suit are brothers and members of a joint Hindu family. The first plaintiff is the son and the second plaintiff, the daughter of the second defendant. The third plaintiff is the wife of the second defendant while the fourth plaintiff is the wife of the first defendant. A daughter of the first plaintiff figures as the fifth pla'ntiff. The tenth defendant in the suit is the Official Receiver in the insolvency of defendants 1 and 2 and the rema'n'ng defendants are cred'tors and decree-holders. The only debt that is really under challenge is the decree debt in O.S. No. 392 of 1955 on the file of the Subord'nate Judge's Court, Coimbatore, for a sum of Rs. 18,000 in favour of defendants 3 to 5. These defendants are the sons of one Rangaswami Naicker, brother of the mother of defendants 1 and 2. It emerges from the evidence that on the death of Rangaswami Naicker in or about 1946 leaving defendants 3 to 5 minors defendants 1 and 2, in view of their close relationship, assumed the management of the properties of defendants 3 to 5 but failed duly to account for the income and profits from the properties of defendants 3 to 5. It is common ground that defendants 1 and 2 were in possession of the propert:es of defendants 3 to 5 for about six years. It is stated for these defendants that by unauthorised application of their funds defendants 1 and 2 added to their own wealth and acquired the suit house and improved their dry lands, sink'ng a well at a heavy cost. Later on defendants 3 to 5 coming of age and insisting upon an accounting for the assets handled by defendants 1 and 2 at a mediation it was decided that defendants 1 and 2 should take all the then standing crops, retain the cattle and moveables in their possession and pay defendants 3 to 5 a sum of Rs. 20,000. It is this liability that formed the consideration of a prom'ssory note which resulted in the decree of Court in O.S. No. 392 of 1955. In the suit on the promissory note defendants 1 and 2 raised various contentions; but eventually settled the cla'm for a sum of Rs. 16,000 taking three months' t'me to pay. The mediat'on was on 1st June, 1952 and the promissory note for the sum of Rs. 20,000 which defendants 1 and 2 had to pay was executed on 9th July, 1952. It transpires that shortly after the mediation there was a criminal complaint by the third defendant charging the present second defendant with offences under Sections 324, 325, 404 and 384, Indian

Penal Code. Actually the complaint was taken on file only under sections 404 and 384, Indian Penal Code. In his sworn statement then recorded the third defendant stated that the accused, the present second defendant, was managing his affairs and properties after the death of his father, and that he took over the stock of timber the deceased had left and made use of it for construction of his own house. The complaint set out that at a panchayat held on 1st June, 1952 the accused had agreed to execute a security bond over his terraced house and dry land in a sum of Rs. 20,000 the amount being payable to defendants 3 to 5 within a year. From the calendar and judgment of the criminal case C.C. No. 837 of 1952 on the file of the Third City Sub-Magistrate, Coimbatore, it is seen that the case was taken up for trial on 11th October, 1952 and the accused discharged under section 253 (1), Criminal Procedure Code, finding that no case was made out. The accused is shown to have been apprehended only on that date *i.e.*, on 11th October, 1952. The order shows that the complainant examined himself as P.W. 1 and deposed that the accused was his uncle, and that the matter being a family dispute the relatives were unwilling to take part in the case. The complainant deposed also about the panchayat. He stated that the panchayatdars were refusing to depose in the matter, and that he had no other witnesses to examine. It is in this background that the appellants question the validity of the debt under two counts: first, it is contended that the promissory note came into existence while a prosecution had been launched against the second defendant, that the promissory note was intended to stifle the pending criminal prosecution, and that so it was vitiated as opposed to public policy. Secondly it is contended that the debt incurred was an *avyavaharika* one and that therefore the debt cannot bind the son. The plaint, of course, contains the usual reckless and meaningless allegations particularly in the context of the case that defendants 1 and 2 neglected their family, that they colluded with defendants 3 and 4, and that the suit O.S. No. 392 of 1955 was itself a collusive suit on a promissory note without any consideration. The Subordinate Judge found that the promissory note was binding on the plaintiffs, that the suit was not collusive, and that the decree was not vitiated in any manner. Our learned brother Venkatadri, J., has on an elaborate consideration of the law applicable in the matter and in the light of the facts that emerged from the record, affirmed the decree of the trial Court and dismissed the appeal. It is held that there is absolutely no evidence to connect the criminal prosecution with the execution of the promissory note. The only witness for the plaintiff in the suit, the mother of the plaintiffs, as P.W. 1 does not even whisper a word about the circumstances under which the promissory note came into existence. It is pointed out by the learned Judge that she does not depose to any coercion, undue influence or pressure being brought upon the second defendant to get him execute the promissory note. The fourth defendant has spoken in detail about the management of the estate by defendants 1 and 2, the circumstances under which the promissory note came to be executed, the suit thereon and the compromise decree. One of the panchayatdars had been examined as D.W. 4. Defendants 1 and 2 have not gone into the witness-box. In these circumstances our learned brother remarked that there was no direct evidence to connect the promissory note with the criminal prosecution.

Before us learned Counsel for the appellants the son and daughter of the second defendant, strenuously contended that as it has been made out that a criminal prosecution was pending against the second defendant and the promissory note had been executed pending the criminal prosecution, it was not only a legitimate but a necessary inference that the promissory note was executed in consideration of dropping the criminal prosecution, scuttling it by not prosecuting it. Learned Counsel contended that the proper inference in this case should be that the launching of the prosecution and the execution of the promissory note were related to each other as cause and effect. According to learned Counsel the fact that the complainant had appeared at the trial of the criminal case and examined himself as P.W. 1 was not of much significance; nor the fact that the Sub-Magistrate had discharged the accused holding that no case was made out a material factor in the examination of the ques-

tion whether the promissory note was given in consideration of withdrawal of the prosecution. Learned Counsel points out that in the very nature of things there will not be direct evidence, and that it is a matter for inference from circumstantial evidence. According to learned Counsel the sequence of events and the blind admission of the complainant in the criminal Court that his witnesses would not help him are tell-tale and indicative that the prosecution was not pressed for the reason that the complainant had had consideration for the same.

Agreements for stifling prosecutions are well-known classes of agreements which the Court refuses to enforce as falling under section 23 of the Contract Act. It is based on the principle that no man shall trade on felony. If the accused person is innocent, the law is abused for the purpose of extortion, and if he is guilty in fact, the law is eluded by a corrupt compromise screening the criminal for a consideration. The offences for which the complaint was taken on file are under sections 384 and 404, Indian Penal Code, which are not compoundable and an agreement made for the purpose of stifling the prosecution in the case, if made out, would certainly invalidate the promissory note. But, for section 23 of the Contract Act to apply, the dropping of the criminal prosecution must be at least a part of the consideration for the promissory note. It is pointed out by Venkataramana Rao, J., in *Veerayya* v. *Sobhanadri*[1]:

> "But I think the true rule is that where there is an existing debt or an obligation, a creditor is not precluded from taking any security therefor by threat of a criminal prosecution and the security is not vitiated by the fact that he was induced to abstain from prosecuting the debtor. But if it is a part of the bargain that the creditor should not prosecute the debtor, the security taken for the debt will be invalid."

The test is, did the dropping of the criminal prosecution form a part of the bargain for the agreement or giving of the promissory note. The giving up of the prosecution need not necessarily be the sole consideration. There may be an antecedent obligation. It is enough if while giving security for the antecedent obligation the dropping of the criminal prosecution is made a part of the bargain. In *Kamini Kumar* v. *Birendra Nath*[2] where there was a dispute as to title to a property and there was also a pending criminal prosecution relating to the same, the Judicial Committee in invalidating a reference to arbitration observed thus:

> "The real question involved in this appeal on this part of the case is whether any part of the consideration of the reference or the ekrarnama was unlawful and .... if it was an implied term of the reference or the ekrarnama that the complaint would not be further proceeded with, then in their Lordships' opinion the consideration of the reference or the ekrarnama, as the case may be, is unlawful."

When there is no pre-existing obligation, the inference that the security or note was given in consideration of dropping the prosecution may in a given case be patent. But when there is a pre-existing legal obligation and the security or note is given for it, it must be made out from the evidence; true, the evidence will normally be circumstantial and it may be by necessary implication that it is a part of the consideration to drop the criminal proceedings. In *Jones* v. *Merionethshire Permanent Benefit Building Society*[3], Bowen, L. J., points out that reparation for an obligation is a duty which the offender owes quite independently of his fear of prosecution or otherwise and that it would be absurd to lay down as an impossible Counsel of perfection that the obligee or the relatives of an offender and his friends are not justified in making reparation to the party injured. The learned Lord Justice emphasises that the abstention from or the dropping of the criminal prosecution should not be made a matter of bargain. If reparation takes the form of a bargain

1. I.L.R. (1937) Mad. 471 at 474, 475. A.I.R. 1930 P.C. 100 at 102.
2. (1930) L.R. 57 I.A. 117 : 59 M.L.J. 82 :
3. (1892) 1 Ch. 173 at 184 and 185.

the bargain is one which the Court will not enforce. Lord Atkin refers again to this principle in *Bhowanipur Banking Corporation* v. *Durgesh Nandini*[1], and points out:

"But it is also of course necessary that each party should understand that the one is making his promise in exchange or part exchange for the promise of the other not to prosecute or continue prosecuting."

Lord Atkins also points out that undue weight should not be given to the fact of the existence of a real obligation. It is observed :

"In this class of case that fact seems irrelevant if the agreement to abandon a prosecution is part of the consideration for payment of the debt. In most cases of this kind there is a debt or a liability. Indeed if there were not, a demand and receipt of money in consideration of refraining from or withholding a prosecution would apparently in itself be a criminal offence."

These principles are again the subject of detailed re-statement in the Supreme Court by Gajendragadkar, J. (as he then was) in *Narasimharaju* v. *Gurumurthy Raju*, [2] where it has been pointed out that all that is required of the parties to impeach the validity of an agreement to settle the criminal proceedings is to give evidence from which the inference necessarily arises that part of the consideration was unlawful. and that the consideration for the agreement was withdrawal and non-prosecution of a criminal complaint.

Learned Counsel for the appellants has not made out in this case circumstances so clinching as to necessarily warrant the inference that it is a part of the bargain when the promissory note was executed that the criminal prosecution should not be proceeded with. True the criminal complaint was filed on 10th June, 1952 and the promissory note was executed on 9th July, 1952. The case was heard only on 11th October, 1952. The record shows that the accused was apprehended only on that date. It is not made out in the evidence that the second defendant was even aware of the fact that criminal complaint had been filed and was pending when he executed the promissory note. To avoid the promissory note, it has to be established that it is a part of consideration that the criminal proceeding should be discontinued. That cannot be made out and there can be no *consensus ad idem* for a bargain if the second defendant had no knowledge of the pendency of the criminal proceedings. Unless he is aware of the pendency of the criminal proceedings, withdrawal of the same cannot be held to form part of the consideration for the promissory note. In the present case defendants 1 and 2 have remained *ex parte* and have not been examined. No attempt has been made to show that the second defendant was aware of the pendency of the criminal proceedings when the promissory note was executed. There is another aspect of the matter and it has a material bearing on the question under consideration. The defence that the promissory note was unenforceable as secured in consideration at least partly for stifling a criminal prosecution was as much available to the second defendant as to the plaintiffs. It would have been, if tenable on the merits, a strong and powerful plea in defence to the action on the promissory note in the suit, O.S. No. 392 of 1955. The plaintiffs have attempted in the plaint to get round the reasonable inference following from the decree on the promissory note by pleading *inter alia* that defendants 1 and 2 had been prevented by defendants 3 to 5 in substantiating their defence in that suit by using wrongful means and pressure and threatening defendants 1 and 2 to consent to a decree.. But these charges have not been made out in the evidence, and even the written statement in that case has not been placed on record now. Learned Counsel strongly relied on an observation in the judgment of the Subordinate Judge that it was clear that the complainant did not prosecute the complaint. The learned Subordinate Judge rejected the evidence of the 4th defendant as D.W. 1 that the complaint was dismissed because the complainant was not able to prove the same. For one thing the inference of the learned Subordinate Judge is not a neces-

1. L.R. (1941) 68 I.A. 144 : (1941) 2 M.L.J. 726 : A.I.R. 1941 P.C. 95 at 96, 98, 99.

2. (1963) 3 S.C.R. 687: (1965) 1 S.C.J. 539 : A.I.R. 1963 S.C. 107 at 110.

sary inference on the facts. No doubt the complainant had pleaded his inability to let in further evidence. It does not necesarily follow that the complainant abstained from proceeding further in the matter as a part of the bargain he had with the second defendant. Even assuming that the third defendant was lukewarm in the prosecution after having secured the promissory note, that would not be sufficient to vitiate the promissory note. His subsequent attitude or his motive in not proceeding further with the prosecution after launching it will not render the promissory note unenforceable if withdrawal of the prosecution was not a part of the bargain. In *Narasimharaju* v. *Gurumurthy Raju*[1], this distinction is noticed. It is observed:

> "This is not a case where it can be reasonably said that the withdrawal of the criminal case may have been a motive and not the consideration by the impugned transaction."

The sequence of events in the present case is not so close nor is the withdrawal of the prosecution so interlinked with the execution of the promissory note as to lead to a reasonable inference that one must have been the consideration at least in part of the other. The first point therefore fails.

Coming to the plea that the debt is an *Avyavaharika* debt and therefore not binding on the son, here again we see no reason to differ from the conclusion of our learned brother. When the father of defendants 3 to 5 died leaving them minors, defendants 1 and 2 took possession of the properties for the purposes of management. It has not been made out in the evidence nor is such a case pleaded in the plaint that the original entry on the properties by the defendants was unlawful and in trespass. They entered on the properties to manage the same on behalf of and for the benefit of the minors. Only they have failed to duly account for the proceeds from the properties and it is this liability that was settled at the Panchayat in a sum of Rs. 20,000. The promissory note was for this amount of Rs. 20,000. We can see nothing *Avyavaharika* in this liability. Colebrooke's translation of the expression "*Avyavakarika*" as meaning "debts for a cause repugnant to good morals," has been generally accepted as the nearest approach to the true conception of the term. Under the Hindu Law a son is under a pious obligation to discharge his father's debts out of his ancestral property even if he had not been benefited by the debts, provided the debts are not *Avyavaharika*. The sons get exonerated from their obligation to discharge the debt of their father from the family assets only if the debt was one tainted with immorality or illegality. The duty that is cast upon the son being religious and moral, the liability of the son for the debt must be examined with reference to its character when the debt was first incurred. If at the origin there was nothing illegal or repugnant to good morals, the subsequent dishonesty of the father in not discharging his obligation will not absolve the son from his liability for the debt. In *Hemraj* v. *Khem Chand*[2], the Judicial Committee observes:

> "It also appears to be clear on principle and on authority, that examination of the nature or character of the debt should be made with reference to the time when it originated, in other words, when the liability was first incurred by the father. If, on such examination, it is found that at the inception the debt was not tarnished or tainted with immorality or illegality, then it must be held that it would be binding on the son."

In *Natesayyan* v. *Ponnusami*[3], which finds approval in *Hemraj* v. *Khem Chand*[2], a decree was passed against a Hindu for money dishonestly retained by him from the plaintiff's family to which he was accountable in respect of it. The judgment-debtor having died, the decree-holder sought to attach in execution, property of the family which had passed into the hands of his sons by survivorship. The sons objected to the attachment challenging the debt as immoral and illegal in the suit to which the creditor was referred. While terming the action of the father in not

1. (1963) 3 S.C.R. 687 : (1965) 1 S.C.J. 539 : A.I.R. 1963 S.C. 107 at 112.
2. (1943) L.R. 70 I.A. 171 : (1943) 2 M.L.J. 397 : A.I.R. 1943 P.C. 142 at 145.
3. (1893) 3 M.L.J. 1 : I.L.R. 16 Mad. 99.

accounting for the sums which he had collected as dishonest, it is observed in that case that the dishonesty was not of such a nature as to absolve the defendants, that is, the sons, from their pious obligation to discharge their father's debts. The learned Judges observe in *Natesayyan* v. *Ponnusami*[1].

"Upon any intelligible principles of morality a debt due by the father by reason of his having retained for himself money which he was bound to pay to another would be a debt of the most sacred obligation and for the non-discharge of which punishment in a future state might be expected to be inflicted, if in any. The son is not bound to do anything to relieve his father from the consequences of his own vicious indulgences, but he is surely bound to do that which his father himself would do were it possible, *viz.*, to restore to those lawfully entitled money he has unlawfully retained."

In *Hemraj* v. *Khem Chand*[2], above cited the Judicial Committee expressed their concurrence with the aforesaid view and with reference to the case before them their Lordships observe:

"The subsequent dishonest conduct of Danpal, which led to the suit and the decree so much relied upon by the Courts in India and made the basis of their decision, cannot in their Lordships' view affect the nature of the father's debt which at its inception was a just and true debt. As no such immorality or illegality in the nature of the original debt as would absolve them from the obligation to discharge it has been shown by the respondents, the debt sought to be realised is not an *Avyavaharika* debt........"

In *Gurunathan Chetty* v. *Raghavalu Chetty*[3], a Bench consisting of Sir Arnold White, C.J. and Wallis, J., with reference to a case where an undivided Hindu father acted as the administrator of an estate and was made liable for moneys received by him and not properly accounted for, affirming the liability of the son for the debt it is observed:

"The evidence is not in our opinion sufficient to warrant us in holding that the failure by the third defendant to account as an administrator amounted to a criminal offence."

The question has received a detailed consideration by a Full Bench of the Andhra Pradesh High Court in *Venkateswara Temple* v. *Radhakrishna*[4], Chandra Reddy, C.J., who delivered the judgment of the Bench, summarised the position thus:

"What emerges from these rulings is that a son could claim immunity only where the debt in its origin was immoral by reason of the money having been obtained by the commission of an offence, but not where the father came by the money lawfully but subsequently misappropriated it. It is only in the former case that the debt answers the description of an *Avyavaharika* debt. If originally the taking was not immoral, *i.e.*, if it did not have a corrupt beginning or founded upon fraud, it could not be characterised as an *Avyavaharika* debt and the son could not be exempted from satisfying that debt. The supervening event, namely, the misappropriation later on would not change the nature of the debt. The vices should be inherent in the debt itself."

When examined in the light of the abovesaid principles, it is impossible to hold that the liability evidenced by the decree debt in O.S. No. 392 of 1955 is *Avyavaharika* in character. It is not even pleaded in the plaint that the original entry by defendants 1 and 2 on the properties of defendants 3 to 5 was trespass or otherwise unlawful and illegal. They had taken up management of the properties for all appearances and ostensibly *bona fide* in the interests of defendants 3 to 5 who were minors, and closely related. They had been in management of the properties for over six years and their accountability for the management was settled at a panchayat. They were found liable to account for a sum of Rs. 20,000. *Ex facie* it is a civil liability to

1. (1893) I.L.R. 16 Mad. 99 : 3 M.L.J. 1.
2. (1943) L.R. 70 I.A. 171 : (1943) 2 M.L.J. 397 : A.I.R. 1943 P.C. 142 at 146.
3. (1908) I.L.R. 31 Mad. 472 at 474.
4. (1963) 1 An.W.R. 308 : A.I.R. 1963 A.P. 425 at 427.

account, which was quantified and settled by a panchayat. The origin of the liability is not repugnant to good morals. The second defendant appears to have acted as a *de facto* guardian for the minors. As and when the second defendant assisted by the first defendant realised money from the estate, his obligation to account to the minors arose. His later failure to account may be dishonest, but that cannot alter the original character of the obligation and made it criminal even initially. We agree in the circumstances with the conclusion of our learned brother confirming the judgment of the trial Court that the promissory note was executed for amounts lawfully due and payable by defendants 1 and 2 to defendants 3 to 5, that the debt at its inception was lawful and therefore binding on the plaintiffs.

In the result the appeal fails and is dismissed with costs.

V.K. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE T. RAMAPRASADA RAO.

The General Electric Company of India (P.), Ltd., Mount Road, Madras .. *Petitioner**

v.

Government of Madras represented by Additional Commercial Tax Officer (Assessment IV), Madras and Chingleput .. *Respondent.*

Sales Tax—Works contract or sale of materials—Assessee, dealer in electrical goods and undertaking works—Electrification of a building—Contract—Scrutiny of terms—Narrow and pedantic interpretation to be avoided—Pith and substance—Composite or severable contract—Issuance of bills—Not sufficient by itself to determine terms of contract or the nature thereof—Sale—Elements.

Madras General Sales Tax Act (I of 1959).

The petitioners are dealers in electrical goods and they undertake also works contract on behalf of others. The contract with the Life Insurance Corporation of India, was a lumpsum contract for the electrification of the building; involving specialized work, skill and judgment. Another contract was also for a lumpsum, involving equally high technical skill and knowledge and it was for providing underground cables and accessories including fire-proof sealing for cables below oil filled switchgears and wood bushes for cables in other locations etc. The department and the Tribunal did not accept the contention of the petitioners that the turnover involved in these contracts constituted receipts on account of works contracts. The Tribunal was of the view that since bills were raised by the contractor as against the contractee that by itself was sufficient to bring the transaction as one for sale of materials. On a revision to the High Court.

Held: The contracts in question are works contract and not contracts of sale of materials pure and simple.

The incidents of passing of title in the goods, not as a result of contract express or implied, to that effect, does not tantamount to a sale within the meaning of the Act.

A narrow and a pedantic interpretation of a contract has to be avoided. Broadly and liberally the contracts have to be scrutinised for purposes of exigibility to tax. If there are overwhelming indications in the contract that it is a composite and indivisible one and what has been agreed to and intended between the parties was not to supply materials in the course of the contract but as and when such materials are imbedded in the contractual work involved they become the property of the other party then there would be no question of the sale of such materials by the contractor to the other.

* T.C. No. 28 of 1964. 29th April, 1967.

No doubt, in a works contract a superficial examination of the elements thereto, would indicate that they are passing of property of the materials from the contractor to the contractee. But it has to be examined further to find out whether the pith and substance of the contract is only execution of the work agreed to between the parties without there being any element of sale of goods or materials. It is also an accepted principle that if a given contract is separable and divisible such that a clear cut distinction can be made between the work involved in the same and the sale of the goods under such a contract, then in so far as the later is concerned, it may be separated from the totality of the contract and dealt with separately. Each case has to be decided on its own merits.

A bill issued by the contractor against the contractee can never by itself, reflect the terms of the contract nor can it establish whether the transactions *inter se* between the parties amounts to a contract for work or for sale of goods.

Held on facts: It is not the case of the Revenue that the contracts in question are severable. On the other hand it is clear from the terms of the contract and the intention of the parties that the contracts are composite in nature. The receipt of a part payment towards a lumpsum contract cannot decide the issue whether the contract is a works contract or a contract for sale of goods. As and when the materials referred to in the bills or invoices submitted by the contractor are imbedded in the work, they became the property of the contractee. There is no agreement that the title in the material so imbedded should pass to the contractee only after the completion of the contract. The supply of materials and the erection are so knitted together that one aspect is not divisible from the other.

Petition under section 38 of the Madras General Sales Tax Act, 1959, praying the High Court to revise the order of the Sales Tax Appellate Tribunal, Madras, dated 29th March, 1963, and made in Tribunal Appeal No. 481 of 1961 (Appeal No. 273 of 1960-61 dated 10th January, 1961 on the file of the Appellate Assistant Commissioner of Commercial Taxes, Madras III—Assessment No. A-3,188/1957/58, dated 27th June, 1960 on the file of the Additional Commercial Tax Officer, Assessment IV, South Madras-Chingleput).

S. K. L. Ratan instructed by *King and Partridge*, for Petitioner.

K. Venkataswami, for the Additional Government Pleader, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The petitioners, the General Electric Company of India Private Ltd., are dealers in all kinds of electrical goods, and they undertake also works contracts on behalf of others. During the year 1957-58 an overall assessment of all the transactions of the petitioners was made by the Additional Commercial Tax Officer IV, South Madras. An appeal was preferred by the petitioners against the order of the Assessing officer, in which *inter alia* the petitioners disputed their liability on a turnover of Rs. 7,00,958-20 alleging that they constituted receipts on account of alleged works contracts. Five contracts were in all involved. Being unsuccessful before the appellate authority, the petitioners filed an appeal before the Sales Tax Appellate Tribunal, Madras, regarding the receipts relating to the works contracts executed by them for the benefit of the Life Insurance Corporation of India and the Superintending Engineer, Basin Bridge Power Station, and other items of their dealings as well. Their contention did not find favour with the Tribunal, with the result the petitioners have now come up to this Court and contended in the main that a sum of Rs. 2,44,121-62 received by them from the Life Insurance Corporation of India, and a sum of Rs. 1,26,958-55 received by them from the Superintending Engineer, Basin Bridge Power Station, are sums received by them in the course of execution of works contracts, which did not involve an independent sale of goods or materials and hence are exempt from taxation. No other point was urged before us,

The contract with the Life Insurance Corporation of India was for electrification of the fourteen storeyed L.I.C. building at Mount Road, Madras. On 29th October, 1956, the petitioners tendered for the work of installation of electric services for the L.I.C. buildings at Mount Road, Madras. It was a lumpsum contract. On a reading of the contract, it is clear that the job undertaken by the petitioners involved specialised work, skill and judgment. The complexity of the work, the enormity of the same and the meticulous details furnished in the tender afford a ready indicia as to the type of the work to be done by the petitioners. The work involved a load of 1,870 killowatts of electrical energy. The M.E.S. regulations permit a maximum load of only 75 H. P. at 440 volts. As the load in the instant case exceeded the permissible limit, a sub-station has to be erected with the transformer provided with switchgears of a high and low tension variety. As the load is heavy, the M. E. S. was to provide a current at 11,000 volts. The voltage of the supply used in the premises is 440 volts. Therefore special adaptation was required to regularise and maintain the supply. The transformer and switch gear both cost about Rs. 76,180-0 and were designed and fabricated in England. These were imported from London against an actual user's licence held by the Life Insurance Corporation of India. Particular care was to be taken in the execution of the work and in the taking of the current for different purposes inside the massive structure. The wiring to this building has been done during and in the course of construction of the building so that lighting is provided from fluorescent tubes, 5 feet in length, two tubes placed in fittings specially designed and manufactured for that purpose and fitted at the time of the construction in necessarily built-in recesses in the false ceiling. The wiring for this is of the concealed type, *i.e.*, steel conduits are buried in the conduit as and when roof slabs are concreted when the building is under construction, for lights and plug points. In the case of wiring for telephone points, a special method was adopted. That is, a collapsible rubber hose pipe was laid and inflated before the laying of concrete and after the concrete was cured, this hose pipe was deflated and withdrawn, thereby leaving a circular duct inside the concrete in which the cables were laid. This kind of work requires special design and arrangement.

Apart from the specialised skill involved in the execution of the contract, the following notable features therein may be usefully referred to, for appreciating the scope and purport of the contract: (1) The price variation clause which provided for an increase in the event of an increase in cost; (2) Provisions for payment of increased rates in the event of the exchange rate being charged (3) Provisions for taking final measurements for payment; (4) Liability for defects discovered within 12 months; (5) Provision for payment of damage at the rate of Rs. 8,500 per week if the work was not completed within a specified date; (6) Contract to be carried as per drawings; (7) Alteration in the work entitling the contractor to additional or lower payment depending upon the nature of the alteration; (8) Provisions for overtime wages for causes beyond the contractor's control; (9) Liability to rectify defects; (10) Provision for use by the contractor of the scaffolding erected by the main contractor; (11) Provision for workshops by the contractor; and (12) Provision for payment of part bills at 90 per cent. of the value of the work executed.

We shall now consider the elements and ingredients of the other contract entered into between the petitioners and the Superintending Engineer, Basin Bridge Power Station. This was also a lumpsum contract and quotation to that effect was made. This involved equally high technical skill and knowledge. Mainly it was for providing underground cables and accessories including fire-proof sealing for cables below the oil-filled switch gears and wood bushes for cables in other locations, 7/.029 Single Core Cambric Insulated Cable with necessary weak back as per rules and paper sleeves for terminating PILC. control cables. Here also a security deposit is taken, a delivery period is provided and a penalty envisaged in case there is a breach. There is scope for variation of the price of the material involved in

1. T.C. 55 of 1960.

the contract. The nomenclature used is a purchase contract; but, as will be shown hereinafter this is a misdescriptional nomenclature.

In our opinion, it is not necessary to set out further details regarding the elements of the above two contracts, as the tests of both of them are not in dispute. The Revenue, however, took up the stand that though the recitals in the contracts do refer to execution of a work, the course of the transactions that actually transpired indicates that the petitioners had in effect supplied materials and that it is in essence a contract for supply of materials though it is linked with the fixing them up in the immovable properties of the contractee. In so far as the second contract with the Superintending Engineer, Basin Bridge Power Station, was concerned, the Revenue was prompted to treat the transaction as involving only sale of material because of the bills or invoices raised by the petitioners against the Superintending Engineer. The Tribunal laid its decision on the words, expressions and the language used by the contractors, which in fact have been quoted *in extenso* in its order. The Tribunal mainly relied upon the decision of this Court in *Udani Engineering Co.* v. *State of Madras*[1], and held that both the contracts in question are not works contract pure and simple, but involved sale of material supplied by the contractors to the contractees and that the dealings were rightly to be brought to tax and that the turnover involved is assessable.

As the fundamental concept to be borne in mind is that the incidence of passing of title in certain goods not as a result of contract express or implied to that effect, by itself does not tantamount to a sale within the meaning of section 2 (*h*) and (*i*) of the Madras General Sales Tax Act, the two contracts in question have to be scrutinised under this perspective.

We shall now take up the contract with the Superintending Engineer, Basin Bridge Power Station, which we shall hereafter refer to as the second contract. The Tribunal was obsessed with the idea that since bills were raised by the contractors as against the contractee, that by itself was sufficient to bring the transaction in the net of taxation. Those bills no doubt reflect the charges claimed by the contractor in respect of the goods supplied and affixed in the course of working of the contract. But it does not afford a guide to interpret the contract as such. Normally, the issuance of such a bill by itself cannot militate against the work involved being a works contract.

It does not refer to the terms of the contract which have to be studied, scrutinised and adverted to before any conclusion, one way or the other, can be drawn. A bill by itself can never reflect the terms of the contract nor can it establish whether the transactions *inter se* between the parties is a contract for work or for sale of goods. As pointed out in *Arun Electrics* v. *Commissioner of Sales Tax*[2], by the Supreme Court:

> "The question whether in respect of a transaction sales tax is exigible may be determined only on the terms of the contract and not from the invoice issued by the person entitled to receive money under the contract."

The Appellate Tribunal, while considering the second contract, laid stress upon the bills submitted by the contractor, though incidentally they refer to the terms of the contract. Such reliance by the Tribunal to come to the conclusion that the contracts in question are not works contracts, is therefore not sustainable.

The other question involved is whether the contract of the petitioners with the Life Insurance Corporation of India, hereinafter referred to as the first contract and the second contract do involve sale of goods only and whether all such transactions are to be brought to tax. The contention of the Revenue in the main, which gained favour with the Sales Tax Appellate Tribunal, is that these transactions primarily involved sale of material and goods and therefore the turnover in question is assessable under the Madras General Sales Tax Act. Reliance was placed on the decision of this Court in *Udani Engineering Co.* v. *State of Madras*[1]. No doubt, in a works contract, a superficial examination of the elements thereto would indicate that there

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1. T.C. 55 of 1960 (unreported). 2. (1966) 17 S.T.C. 576.

is passing of property of the materials from the contractor to the contractee. But it has to be examined further to find out whether the pith and substance of the contract is only execution of the work agreed to between the parties without there being any element of sale of goods or materials. It is also an accepted principle by now that if a given contract is separable and divisible such that a clear cut distinction can be made between the work involved in the same and the sale of the goods under such a contract, then in so far as the latter is concerned, it may be separated from the totality of the contract and dealt with separately. Each case has to be decided on its own merits. In *Udani Engineering Co.* v. *State of Madras*[1], the learned Judges held that it was fairly clear that the contract established a sale of electric material and equipment by the petitioner to the Defence Department. That was also a case wherein the contractor undertook to fit the materials in the building without stipulating any special remuneration for carrying out that work. In these circumstances, the learned Judges held in that case that the contract primarily was one in which sale of goods were involved and the elements of works contract were totally absent therein. It was this case which was relied upon by the Sales Tax Appellate Tribunal when it came to the conclusion that the turnovers in both the contracts in question are exigible to tax. We are, however, unable to be persuaded that the contracts in question involved such sale of materials.

A narrow and a pendantic interpretation of a contract has to be avoided. Broadly and liberally, the contracts in question have to be scrutinised for purposes of exigibility to tax. If there are overwhelming indications in the contract that it is a composite and an indivisible one and what has been agreed to and intended between the parties was not to supply materials in the course of the contract but as and when such materials are imbedded in the contractual work involved they became the property of the other party, then there would be no question of the sale of such materials by the contractor to the other. In a recent case disposed of by us, *McKenzies Ltd.* v. *Board of Revenue*[2], we have summarised the legal position as follows:

"Whether a given transaction is a works contract or a sale of goods is a mixed question of law and fact, and will have to be answered invariably in relation to the terms of a particular contract. The test will be the intention of the parties as gathered from the entirety of the contract, whether on a fair reading of the contract the parties agreed to sell and purchase a finished or a completed article or commodity or meant to treat the transaction as one for labour to be bestowed on an article or commodity serving as the base. It may also be useful and necessary to keep in mind whether the transaction relates to a movable or an immovable. In the case of the lattes question will be whether the entire construction or product in the nature of the immovable property is meant to be sold or where a construction or works are to be carried out on immovable property the property in materials, by what is done on or to immovable property, passes by affixture in the process of the works. In other words, if the contract is a composite one, it is to be found out whether it can be split up and a part of it can be regarded as an agreement to sell specific goods incorporated to immovable property. The same test may also to some extent apply to works relating to a movable."

It is elementary to note that in a sale there should be an agreement between the parties to the effect that one intends to transfer title in the goods to the other and as a result of such a transaction, the property in such goods must actually pass title in the goods to the other. These and other elements are absolutely essential before a given deal can be characterised as a sale. As pointed out by the Supreme Court in *Government of Andhra Pradesh* v. *Guntur Tobaccos Ltd.*[3]:

"A contract for work in the execution of which goods are used may take one of three forms. The contract may be for work to be done for remuneration and for supply of materials used in the execution of the works for a price; it may be a

1. T. C. No. 55 of 1960.
2. Since reported in (1968) 21 S.T.C. 279.
3. (1965) 16 S.T.C. 240 : (1965) 2 S.C.R. 167 ; A.I.R. 1965 S.C. 1306.

contract for work in which the use of materials is accessory or incidental to the execution of the work ; or it may be a contract for work and use or supply of materials, though not accessory to the execution of the contract, is voluntary or gratuitous. In the last class there is no sale because though property passes, it does not pass for a price. Whether a contract is of the first or the second class must depend upon the circumstances ; if it is of the first, it is a composite contract for work and sale of goods ; when it is of the second category, it is a contract for execution of work not involving sale of goods."

This Court again had occasion recently to consider one other decision of the Supreme Court reported in *John Mowlem & Co., Ltd.* v. *Commissioner of Sales Tax*[1], as providing a guide to determine whether a contract is a works contract or not. The following observations therein is apposite :

"In a works contract, the agreement between the parties is that the contractor should construct the works according to the specifications contained in the agreement, and in consideration therefor receive payment as provided therein, and in such an agreement there is neither a contract to sell the materials used in the construction, nor does property pass therein as movables."

One other principle has also been recently settled by the Supreme Court in *State of Gujarat* v. *Kailash Engineering Co. (P.) Ltd.*[2]. It is as follows : If the terms of the contract indicate that the contractee is not to be the owner of the product contracted or built upon by the contractor and if the property in the finished product vests in the contractee even during the process of construction, the transaction is clearly works contract and does not involve any sale.

Reference may also be usefully made to a decision of this Court in *Richardson and Cruddas Ltd.* v. *State of Madras*[3], where the learned Judges observed as follows :

"The distinction between a works contract for work and labour, and a contract of sale is a fine one, and it is neither feasible nor practicable to formulate in the abstract, an all comprehensive and universal rule applicable to all cases......

In cases where the contract consists of the fabrication and erection of steel structures or buildings on the site of the customer, the main test is to find out whether the customer ever bargained for the sale and purchase of the component parts used in the work of fabrication and erection or construction. If, under the contract, structural materials are to be affixed to the land and only thereafter the property therein would pass to the customer notwithstanding that they were approved by him, and even paid for, the contract would be a works contract. The fact that payments are made before the work is completed in its entirety is not of decisive significance."

In the two contracts in question, it has not been urged by the Revenue that they are severable and that that portion of the contract which might refer to the supply of materials can be taken out of the context of the contract and treated as an independent one. On the other hand, it is fairly clear from the terms of the contract and from the intention of the parties that both the contracts are composite in nature. What weighed with the Tribunal was the meticulous details quoted by the contractor when he tendered for the contract and obtained a part-payment towards the lump sum contracts. As already stated, the receipt of a part-payment towards a lump sum contract cannot decide the issue whether a given contract is a works contract or a contract for sale of material. The intention of the parties and the course of working of the contract has to be taken as a whole before coming to the conclusion that it is not a works contract. In the cases in question, we have already stated that much of complexity was involved and technical skill and labour called for in the matter of designing erection and completion of the contract in question. As

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1. (1967) 19 S.T.C. 59. A.I.R. 1967 S.C. 547.
2. (1967) 2 S.C.J. 401 : (1967) 19 S.T.C. 13 : 3. (1965) 16 S.T.C. 827.

and when the materials referred to in the bills or invoices submitted by the contractor, are imbedded in the base of the work, they become the property of the contractee. There is no agreement that the title in the material so imbedded should pass to the contractee only after the completion of the contract. The various tests laid down by this Court and by the Supreme Court do not enable us to construe the contracts in question as contracts of sale of material pure and simple. The supply of materials and the erection are so knitted together that one aspect is not divisible from the other, such that both the contracts in question are composite contracts to render work to the contractee. The Tribunal has not rightly appreciated the principle in *Udani Engineering Co.* v. *State of Madras*[1], and has therefore wrongly approached the subject. We have no hesitation in holding that, having regard to the various clauses in the contracts already referred to by us and the predominant indicia which overwhelms the contracts in question, these are works contracts and they do not involve in any manner or in any wise a sale of material as is popularly or legally understood.

No other question was argued before us though it was raised before the Tribunal We, therefore, set aside the order of the Tribunal, excepting to that portion of the same relating to remand, in so far as they directed the inclusion of the turnover relating to both the contracts in question as assessable turnover. T.C. No. 28 of 1964 is therefore allowed with costs. Counsel's fee Rs. 150.

V.S. ———— *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T. RAMAPRASADA RAO.

N. Arunachalam .. *Petitioner**

v.

Lt.-Colonel V. Srinivasan .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 25 *and rule* 18 (3) *of the Rules*, 1961 *and Civil Procedure Code (V of* 1908), *section* 115—*Petition by landlord dismissed for default—Order of Rent Controller setting aside dismissal—Revision against order under section* 115, *maintainable—Order setting aside dismissal for default—Non-speaking order—Liable to be interfered with—Application to set aside* ex parte *order—Affidavit in support filed by Counsel for the applicant—Propriety—Practice.*

A revision petition can be entertained by the High Court under section 115 of the Civil Procedure Code against the order of the Rent Controller passed under section 18 (3) of the Rules setting aside an order dismissing the petition for default Where an order of the Rent Controller is non-speaking, and it does not state whether sufficient cause has been shown by the landlord for the absence and whether the Controller was satisfied with the absence of the landlord when the petition was called, the order of the Rent Controller setting aside the dismissal is liable to be interfered with under section 115 of the Code.

An application to set aside an order of dismissal for default can be supported by an affidavit filed by the Counsel for the aggrieved party.

Petition under section 25 of Madras Act XVIII of 1960, Madras Buildings (Lease and Rent Control) Act, 1960 praying the High Court to revise the order of the Court of Small Causes (Fifth Judge) Madras, dated 11th July, 1966, and made in I.A. No. 1173 of 1966 in H.R.C. No. 1359 of 1966.

G. N. Chari, for Petitioner.

K. C. Rajappa, for Respondent.

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1. T.C. No. 55 of 1960.

* C.R.P. No. 1905 of 1966. 23rd June, 1967.

The Court made the following

ORDER.—In this Civil Revision case two questions have been argued :—(1) whether the Civil Revision Petition is maintainable at all in the High Court, and (2) Whether the order does satisfy the requirements of rule 18 (3) of the Madras Buildings (Lease and Rent Control) Rules, 1961. The landlord filed an application under section 14 of the Madras Buildings (Lease and Rent Control) Act. The application was posted for hearing on 13th June, 1966. As the landlord was absent, it was dismissed. On an affidavit sworn to by the Advocate for the landlord filed in support of an application to restore the original Rent Control Petition and after hearing the parties, the Rent Controller set aside the *ex parte* order.

Mr. G. N. Chari, learned Counsel for the petitioner tenant before me contends that the order suffers by two infirmities, namely, that the Rent Controller did not give any finding whether sufficient cause has been shown by the landlord for restoration of the application dismissed for default; and (2) the procedure adopted by the landlord in setting up his Advocate to file the affidavit in support of the application was not warranted under rule 18 (3).

In so far as the latter contention is concerned, I do not think it is well founded. The rule says that a person aggrieved by the *ex parte* order may apply to the Controller and the application may be by the affected party. The material in support of the application may be furnished by any one of the choice of the persons affected. By way of illustration if a person is involved in an accident and is therefore prevented to appear in Court on the date of hearing and his father or his son or his relative filed an affidavit stating the facts in support of an application for restoration of the suit dismissed for default or allowed *ex parte*, it cannot be said that such a material furnished in support of the application cannot be deemed to be a material furnished by the person affected himself. So also in this case the Counsel who appeared for the landlord took upon himself the responsibility of filing a petition or an affidavit stating the facts and the circumstances under which the petitioner or himself could not be present on the date of hearing. Such material furnished by the Counsel is only for the landlord and not in furtherance of a cause of a person other than the landlord. In my opinion, the petition filed by the Counsel for the landlord before the Rent Controller supported by an affidavit of his Advocate is certainly an application made by the aggrieved landlord himself notwithstanding the fact that the landlord by himself did not swear to an affidavit or file a verified petition in support of the application to set aside the *ex parte* order.

The second contention of Mr. G. N. Chari is well founded. The order of the Rent Controller is non-speaking. It does not even state whether a sufficient cause has been shown by the landlord who is the aggrieved party; nor does it refer to the fact that the Controller was satisfied with the absence of the landlord. I have therefore no hesitation in setting aside this order.

Learned Counsel for the respondent however states that no Civil Revision Petition can be entertained against an order made by the Rent Controller under rule 18 (3). It is suggested that as an appeal lay against an order passed by the Rent Controller under rule 18 (3) a revision against the said order of the Rent Controller ought not to be entertained. Section 25 is one amongst many sections in the Madras Buildings Act, 1960 which Act itself is a beneficial piece of legislation. It cannot be assumed or presumed by necessary implication that the jurisdiction of this Court as a revisional Court otherwise than under section 25 of the Madras Buildings Act, 1960 would be excluded by reason of an express provision like section 25 of the Madras Buildings Act. Mr. G. N. Chari would also put it on the ground that this Civil Revision Petition can be entertained by this Court under section 115 of the Code of Civil Procedure. In my opinion, section 115 of the Civil Procedure Code and section 25 of the Madras Buildings Act are mutually exclusive and the revisional jurisdiction of this Court under section 115, Civil Procedure Code is always available to inter-

fere with any order of the kind before me. I am therefore satisfied that the Civil Revision Petition is maintainable.

While setting aside the order of the Rent Controller I remit the petition for fresh disposal in accordance with law and on its merits. No costs.

V.S. ——— *Order at aside matter remitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMAMURTI AND MR. JUSTCE A. ALAGIRISWAMI.

Veeramalai Vanniar (died) by L.Rs. .. *Appellants**

v.

Thadikara Vanniar and others .. *Respondents.*

Specific Relief Act (I of 1877), section 27 (b)—Scope and applicability—Claim for specific performance of agreement of sale—Subsequent purchasers not paying the entire purchase price—The purchasers having knowledge of the agreement of sale—Subsequent purchaser's duty to enquire about the precise character of possession by the possessor at the time of the subsequent sale transaction—Right to claim benefit of section 27 (b).

The general rule is that no person can convey a better title than what he has, except where the statute provides exceptions to the rule like section 27 (*b*) of the Specific Relief Act. If a person as the owner of the property, has entered into an agreement to sell his property, he cannot thereafter convey the same property to any other person, as after the prior agreement of sale, he cannot be said to be a free owner of the property. If he subsequently alienates the property he can alienate it only subject to the rights created under the prior agreement of sale.

The plain language of section 27 (*b*) of the Specific Relief Act shows that the subsequent transferee can retain the benefit of his transfer by purchase which, *prima facie* he had no right to get, only after satisfying the two conditions concurrently : (1) he must have paid the *full value* for which he purchased the property and (2) he must have paid it in good faith and without notice of the prior contract. Further, the burden of proof is upon the subsequent prurchaser to establish these conditions in order that his rights may prevail over the prior agreement of sale.

In the instant case, even at the time when the 1st defendant gave evidence, there was admittedly a balance of Rs. 7,000 under the three sale deeds. Not only that. The defendants had knowledge of the plaintff's prior agreement of sale when they took the sale deeds. Even if the defendants had no actual notice or knowledge of the agreement of sale, they must be deemed to have had constructive notice or knowledge on the admitted facts of the case.

In such cases, it is the duty of the subsequent purchaser to enquire the person in possession as to the precise character in which he was in possession at the time when the subsequent sale transaction was entered into.

The defendants having failed to satisfy both the limbs of section 27 (*b*) of the Specific Relief Act, the plaintiff will be entitled to a decree for specific performance.

Appeals against the Decree of the Court of the Subordinate Judge of Thanjavur is O.S. Nos. 29 of 1960 and 27, 28 and 29 of 1961 respectively.

K. Rajah Ayyar, K. S. Desikan and *K. Raman*, for Appellants.

R. Gopalswami Ayyangar, and *M. Srinivasan*, for Respondents 1 and 2.

V. Srinivasa Ayyar, for Respondents 7 to 9.

The Judgment of the Court was delivered by

Ramamurti, J.—This batch of four appeals arises out of four suits which were tried and disposed of by a common judgment by the learned Subordinate Judge,

* A.P. Nos. 199, 440, 441, and 442 of 1962. 7th July, 1967.

Thanjavur. Appeal No. 199 of 1962 is against the decision in O.S. No. 29 of 1960, the evidence in which, by consent of parties, was treated as evidence in the other suits. It will be therefore convenient to refer to the rank of the parties and the controversy in that suit, as the decision therein has to simply follow in the other three appeals.

The appellant in A.S. No. 199 of 1962 (hereafter referred to as the appellant) filed the suit O.S. No. 29 of 1960, claiming specific performance of an agreement of sale of the suit properties, of an extent of about 1½ velis, situate in the village Mela Uthamanallur, Tanjore Taluk. The plaintiff's brother is the 1st defendant and the latter's wife is the 2nd defendant. Minor defendants 3 to 5 are the children of defendants 1 and 2. Ammani Ammal, the 6th defendant, to whom the suit properties belonged died pending suit and on her death, her only daughter and legal representative was impleaded as the 7th defendant. The plaintiff's case was that in Avani 1956, an agreement was entered into between the plaintiff and the 6th defendant to sell the suit properties, about 1½ velis in extent, for a sum of Rs. 9,000, that under that agreement the sale transaction was to be completed by the next 30th of Chithrai, *i.e.*, April 1957, that on 19th September, 1956, the plaintiff paid a sum of Rs. 1,000 towards part payment of the price and that the same was evidenced by a document signed and passed by one Thiruvenkadam, the son-in-law and agent of Ammani Ammal and in that document all the details of the agreement of sale have been embodied, *viz.*, the price fixed at Rs. 9,000 the payment and receipt of Rs. 1,000, the balance of Rs. 8,000 to be paid before the next Chithrai, *i.e.*, April 1957, and the sale was to be completed. The plaintiff's further case was that on 30th October, 1956, this Thiruvenkadam, the agent of Ammani Ammal, wrote a letter urging upon the plaintiff to complete the transaction without further delay and not to wait till Chithrai, at the same time warning the plaintiff that the 1st defendant, the plaintiff's brother, was making efforts to purchase the properties. The plaintiff was obliged to file the present suit as he subsequently discovered that at the instance of the first defendant, his brothers, Ammani Ammal had executed three sale deeds all dated 29th December, 1956, comprising various items of properties including the suit properties, the vendees under the sale deeds, being the first defendant's minor children 3rd, 4th and 5th defendants. In addition to the other evidence in the case, both oral and documentary, the plaintiff mainly relied upon the two letters given by Thiruvenkadam on behalf of Ammani Ammal, the vendor to the plaintiff. The contesting defendants resisted the suit on the ground *inter alia* that no such agreement of sale was entered into between the plaintiff and 6th defendant, that the two letters alleged to have been written by Thiruvenkadam purporting to be on behalf of the vendor, Ammani Ammal, are ante-dated and concocted documents and that in any event, the defendants were *bona fide* transferees in good faith and for value paid without any knowledge of the alleged agreement of sale in favour of the plaintiff.

The plaintiff is admittedly in possession of the suit properties, and in this suit, while claiming specific performance, he had deposited in the trial Court the balance of the price due by him. The other three suits were filed by the three minor sons of the first defendant for possession of the suit properties to the extent covered by the respective sale deeds in favour of each of the defendants which, naturally was resisted by this Veeramalai, the plaintiff in O.S. No. 29 of 1960, and the sole defendant in all these suits on the basis of the aforesaid agreement of sale. The learned Subordinate Judge negatived the contentions of the plaintiff and dismissed his suit and following upon that, decreed the other suits. Hence this batch appeals by this Veeramalai for enforcement of his rights under the agreement of sale.

[After referring to the main background of the case and the facts and after an elaborate analysis of the evidence adduced, his Lordship proceeded to hold]:

For all these reasons, we have no hesitation in upholding the plaintiff's case of the agreement of sale.

The only question that remains is whether the defendants are entitled to invoke the provisions of section 27 (b) of the Specific Relief Act, as persons who have paid money in good faith and without notice of the original contract. It is simply amusing how, on the admitted facts, the learned Subordinate Judge felt that defendants 3 to 5 are transferees for value who have paid their money in good faith and without notice of the plaintiff's agreement of sale. He has not borne in mind the rudiments and the basic principles of law. The general rule is that no person can convey a better title than what he has, except where the statute provides exceptions to the rule like section 27 (b) of the Specific Relief Act. If a person, as the owner of the property, has entered into an agreement to sell his property, he cannot thereafter convey the same property to any other person, as after the prior agreement of sale, he cannot be said to be a free owner of the property. If he subsequently alienates the property he can alienate it only subject to the rights created under the prior agreement of sale. Section 27 of the Specific Relief Act is in these terms :

> "27. Except as otherwise provided by this chapter, specific performance of a contract may be enforced against—
>
> (a) Either party thereto;
>
> (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract."

The plain language of the sub-section (b) shows that the subsequent transferee can retain the benefit of his transfer by purchase which, *prima facie* he had no right to get, only after satisfying the two conditions concurrently (1) he must have paid the full value for which he purchased the property and (2) he must have paid it in good faith and without notice of the prior contract. Further the burden of proof is upon the subsequent purchaser to establish these conditions in order that his rights may prevail over the prior agreement of sale. It will be sufficient to refer to the decision of the Privy Council in *Bhun Narain Singh* v. *Gokhul Chand Mahton*[1] about the stringent nature of the conditions and the burden of proof under section 27 (b). In the instant case, admittedly the full price has not been paid at the time when controversy arose and even at the time when the suit was filed. The learned Judge was of the view, that because, the bargain as embodied in the three sale deeds provided for the payment of the money in convenient instalments and as a substantial portion of the price had been paid, the defendants must be regarded as transferees who paid their money. This view is clearly erroneous. It is sufficient to refer to the leading decision in *Himatlal Motilal* v. *Vasudev Ganesh*,[2] in which it was held that in order to defeat the prior equity to which the plaintiff was entitled, the subsequent purchasers were bound to establish three things that (1) they were purchasers value, (2) *bona fide* and (3) without notice; and that if the entire price had not been paid and a security had been given for the payment of the balance of the purchase price, the defendants cannot resist the claim for specific performance (*vide* observations at page 451 of the above decision). Section 27 (b) of the Specific Relief Act is only the statutory provision of the principles enunciated in the decisions in England to which reference has been made in this Bench decision of the Bombay High Court. The principle in this decision was referred to with approval in *Mohammad Haneef Sahib* v. *The Board of Trustees, Jumma Masjid, Adoni*[3], in which it was held that the words in section 27 (b) 'who has paid his money' mean the transferee who has paid the whole of the consideration and not a transferee who has paid only part of it. Our attention was also drawn to the decision of Justice Varadachariar in *Arunachala* v. *Madappa*[4], in which the learned Judge (Varadachari, J), called for a finding from the trial Court as to the dates on which the subsequent purchaser paid and could be deemed to have paid the purchase price. A perusal

1. (1934) 66 M.L.J. 255 : L.R. 61 I.A. 115.
2. (1912) I.L.R. 36 Bom. 446.
3. (1944) 1 M.L.J. 376.
4. A.I.R. 1936 Mad. 949.

of the Judgment shows that the learned Judge was also of the view that the entire purchase money should have been paid before the subsequent purchaser obtained knowledge of the prior agreement of sale. In the instant case, even at the time when the 1st defendant gave evidence, there was admittedly a balance of Rs. 7,000 due under the three sale deeds (*vide* D.W. 1's evidence at page 44 of the typed papers). The learned Judge has committed a serious error in thinking that the words 'who has paid his money' in section 27 (*b*) are equivalent to 'who has paid his money' or 'who has agreed to pay his money.' The Judge has overlooked that it is actual payment of the money which alone confers the right so as to prevail over a prior agreement of sale.

The trial Court has committed the same serious error in holding that the defendants are transferees without notice of the original contract under section 27 (*a*) of the Specific Relief Act. We have already held that the defendants had actual knowledge of the plaintiff's prior agreement of sale when they took the sale deeds, Exhibits B-13 to B-15. Even if the defendants had no actual notice or knowledge of the agreement of sale, they must be deemed to have had constructive notice or knowledge on the admitted facts of the case. It is surprising how the learned Judge was persuaded to find this point in favour of the defendants despite the fact that his attention was invited to the decision in *Yella Reddi* v. *Subbi Reddi*[1], of the Andhra High Court which contains a reference to all the leading decisions in England and India and in particular to the decisions of this Court, the latest being the decision of Justice Balakrishna Iyer in *Parvathammal* v. *Sivasankara Bhattar*[2]. It only shows that the learned Judge has not carefully looked into the decisions referred to in his Judgment. He says that no enquiry is necessary by the subsequent purchaser regarding the rights of the person who is already in possession, once it is found that that person originally got into possession as a lessee under the vendor. In other words, the learned Judge holds that if the subsequent purchaser knew that at some earlier point of time the person who relied upon the prior agreement of sale was already in possession as a lessee, the subsequent purchaser need not make any enquiry as to whether the lessee was continuing in possession only as a lessee or in the assertion of any other right. It is this identical point which has been considered by the leading decisions in England and in India and the view has been uniformly taken in all the cases that it is the duty of the subsequent purchaser to enquire the person in possession as to the precise character in which he was in possession at the time when the subsequent sale transaction was entered into. In *Parvathammal* v. *Sivasankara Bhattar*[2], a usufructuary mortgagee was in possession of the property and an agreement of sale was entered into by the mortgagor to sell the property to the usufructuary mortgagee in satisfaction of the mortgage and also for payment of some additional consideration. The contesting defendant was the subsequent purchaser and it was admitted that the latter did not make any enquiry of the usufructuary mortgagee in order to ascertain from him whether he had any rights in the property other than as usufructuary mortgagee. This identical argument which was accepted by the trial Court in the instant case was advanced that once it was known that the property was in the possession of a usufructuary mortgagee, there was nothing further that a prospective purchaser of the property need have enquired about. This argument was rejected in unambiguous terms. The learned Judge has referred to all the leading decisions and in particular had extracted the following statement of law in *Barnhart* v. *Greenshields*[3]:

> "With respect to the effect of possession merely, we take the law to be, that if there be a tenant in possession of land, purchaser is bound by all the equities which the tenant could enforce against the vendor and that the equity of the tenant extends not only to interests connected with his tenancy as in *Taylor* v. *Stibbert*[4], but also to interests under collateral agreements, as in *Daniels* v. *Davidson*[5], *Allen* v. *Anthony*[6], the principles being the same in both classes of cases, namely,

1. (1954) 2 M.L.J. (Andh.) p. 6.
2. (1951) 2 M.L.J. 191.
3. (1853) 14 E.R. 204 at 209.
4. (1794) 2 Ves. Jr. 437.
5. (1809) 16 Ves. 249.
6. (1816) 1 Mer. 282.

that the possession of the tenant is notice that he has some interest in the land, and that a purchaser having notice of that fact, is bound, according to the ordinary rule, either to inquire what that interest is, or to give effect to it, whatever it may be."

Yella Reddi v. *Subbi Reddi*[1] was a case in which the person in whose favour a prior agreement of sale was entered into was already in possession as a lessee but the property was subsequently sold to the contesting defendant. There too the same argument was advanced, that in view of the character of the plaintiff's possession at its inception as a tenant, there was no duty cast upon the subsequent purchaser to make any further enquiry. This argument was not accepted. As this decision reviews the relevant cases on the topic, it is unnecessary to burden this judgment by referring to all the cases. Reference may, however, be made to the following observations of the Lord Chancellor in the leading decision which has been followed in all subsequent cases in *Daniels* v. *Davison*[2],

"Where there is a tenant in possession under a lease, on an agreement, a person purchasing part of the Estate must be bound to inquire on what terms that person is in possession..................that a tenant being in possession under a lease, with an agreement in his pocket to become the purchaser, those circumstances altogether give him an equity repelling the claim of a subsequent purchaser who made no enquiry as to the nature of his possession."

(*Vide* also 34 Halsbury's Laws of England, page 366, paragraphs 644 and 14, Halsbury's Laws of England, page 546, paragraph 1024). For all these reasons, it has to be held that the defendants have failed to satisfy both the limbs of section 27 (*b*) of the Specific Relief Act, (1) they have not paid the money and (2) they are not transferees in good faith and without knowledge of the prior agreement of sale. The plaintiff will be entitled to a decree for specific performance as against defendants 2 to 5 and 7. The sale deed to be executed by them shall be on the lines indicated in the decisions of the Supreme Court in *Durga Prasad* v. *Deep Chand*[3]. As the plaintiff has deposited the balance of price at the time of the institution of the suit, there is no question of the plaintiff being liable for mesne profits thereafter. From May 1957, till 8th June, 1960, for three years they the defendants will not be liable to pay interest on the balance of Rs. 8,000. So far as the period from May, 1957 to 1960 is concerned, on our findings, the plaintiff has been in possession not as a lessee but only in pursuance of the agreement of sale. He will not be liable for any rent or damages for use and occupation nor for any mesne profits. The question is whether he could be held liable for interest on the balance of Rs. 8,000 from May, 1957 to 8th June, 1960. He was always ready and willing but neither defendants 3 to 5 nor the 6th defendant would receive the money and complete the transaction. On the other hand, the plaintiff was harassed by eviction proceedings and put to unnecessary expenses. In those circumstances, having regard to the fraudulent conduct of the 1st defendant, we are of the view that the plaintiff should not be made liable for interest. The result is that a sale deed will have to be executed in favour of the plaintiff and the sum of Rs. 8,000 will have to be taken by defendants 3 to 5. Instead of the properties, their rights will be transferred to the balance *i.e.*, the sum of Rs. 8,000. In view of this conclusion of ours, the question of the plaintiff's right to the site on which he has put up the building on payment of paghudi does not arise.

The result is that A.S. No. 199 of 1962 is allowed and the plaintiff's suit, O.S. No. 29 of 1960 is decreed. The plaintiff will be entitled to his costs here as well as in the trial Court as against defendants 2 to 5 and the 7th defendant. A.S. Nos. 440, 441 and 442 of 1962 are also allowed and the connected suits O.S. Nos. 27, 28 and 29 of 1961 are all dismissed. There shall be no order as to costs in the trial Court in all the three suits. In the three appeals, A.S. Nos. 440, 441 and 442 of 1962, the

1. (1954) 2 M.L.J. (Andh.) 6.
2. (1809) 16 Ves. 249 at 254.
3. (1954) 1 M.L.J. (S.C.) 60 : (1954) S.C.J. 23 : (1954) S.C.R. 360.

appellant will be entitled only to the Court-fee paid by him in this Court. We are not awarding separate Counsel's fee in all these three appeals either in the trial Court or here as they were tried along with the other suit O.S. No. 29 of 1960 and the arguments were the same. The defendants are directed to execute the conveyance within two months after the receipt of the Judgment in the lower Court. On their default in doing so, plaintiff will be entitled to execute this decree for specific performance. At the time of the execution of the sale deed and before the payment of Rs. 8,000 is made to defendants 3 to 5, the plaintiff will be entitled to adjust and to be paid the costs which have been decreed in his favour as per the decree. If the defendants had taken possession of the suit properties taking advantage of the decree of the trial Court they should surrender possession to the plaintiff. There shall be a decree for possession in favour of the plaintiff accordingly. The defendants will also be liable for mesne profits for that period which shall be ascertained by the trial Court. And this appeal having been set down this day for being mentioned in pursuance of the letter dated 27th April, 1967, of the Advocates for the Respondents, the Court made the following

ORDER.—The defendants are not liable for interest. The decree shall be drafted accordingly.

V.M.K. ——— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE T. RAMAPRASADA RAO.

J. M. Bhansali and others .. *Petitioners**

v.

The State of Madras represented by the Deputy Commercial Tax Officer, Godown Division and another ... *Respondents.*

Madras General Sales Tax Act (I of 1959), section 31—Appeal against assessment—Delay in filing—Party bona fide *prosecuting some other proceeding (writ)—Condonation of delay—When justifiable.*

In deciding the question, the most relevant factor to be taken into account is whether the party concerned has *bona fide* prosecuted some other proceeding because of which delay has occurred in filing the appeal. It may be that, in selecting a particular remedy, the party may have been ill-advised. The test is not whether in law the other remedy prosecuted is legally correct or justifiable. There may however be cases where, *ex facie*, the remedy chosen by the assessee is unjustified and may show lack of *bona fides*. (*Held* on facts that the parties must have honestly believed, perhaps on advice, that they could get the relief they wanted in the writ petitions and the long delay in filing the appeals was more due to the time taken by the pendency of the writ petitions).

Petitions under section 38 of the Madras Act I of 1959 (see rule 32) to revise the orders of the Sales Tax Tribunal, Madras, and passed in T.A. Nos. 999/63, 1036/63, 1037/63, 1038/63, 1039/63, 1040/63, 1041/63, 1042/63, 1043/63 dated 6th May, 1964 respectively against the orders of the Appellate Assistant Commissioner, CT, Madras-1, all relating to the assessment year 1957-58 in the appeal Nos. 119/63-64, 111/63-64, 113/63-64, 114/63-64, 117/63-64, 112/63-64, 115/63-64, 116/63-64, 118/63-64 all dated 12th June, 1963 respectively (Assessment Nos. A3. 324/57-58 dated 25th March, 1959, A3. 374/57-58 dated 30th March, 1959, A3. 306/57-58 dated 31st March, 1959, A2. 655/57-58 dated 15th March, 1959, A.3. 637/57-58 dated 25th March, 1959, A3. 506/57-58 dated 30th March, 1959, A3. 544/57-58 dated 25th March, 1959, A 3. 326/57-58 dated 28th March, 1959 all on the file of the Deputy Commercial Tax Officer, Godown Division, and A3.

* Tax Case Nos. 24 to 32 of 1965 (Revisions Nos. 12 to 20). 18th July, 1967.

334/57-58 on the file of the Assistant Commercial Tax Officer, Godown Division respectively.

C. S. Chandrasekara Sastry, for Petitioner.

The Special Government Pleader, for Respondent.

The Order of the Court was made by

Veeraswami, J.—Different assessees filed these petitions from a common order of the Tribunal, which, agreeing with the Appellate Assistant Commissioner, held that no sufficient cause was shown to excuse the delay in filing the appeal. The assessment orders were received by the assessees on different dates in April, 1959, and in one case in May, 1959. They filed writ petitions on April, 25 directed against these orders except in one case in which the date of filing was 26th May, 1959. This Court disposed of the writ petitions on 26th April, 1962, except one of them which was disposed of on 9th November, 1961. Appeals were filed on 25th May, 1962, but one of them on 5th June, 1962. It appears as the department would have it, the appeal petitions were returned for compliance but they were re-presented only at the end of January, 1963. Thus there has been a delay in each case of about three years.

We are unable to share the view of the Tribunal or the Appellate Assistant Commissioner that, in the circumstances of these cases, sufficient cause was not shown. In deciding the question, the most relevant factor to be taken into account is whether the party concerned has *bona fide* prosecuted some other proceeding because of which delay has occurred in filing the appeal. It may be that, in selecting a particular remedy, the party may have been ill-advised: The test is not whether in law the other remedy prosecuted is legally correct and justifiable. There may however be cases where, *ex facie*, the remedy chosen by the assessee is unjustified and may show lack of *bona fides*. These are not such cases. There are no circumstances or facts in these cases to assume that when the assessees invoked Article 226 of the Constitution and sought the assistance of this Court to quash the assessment orders, they acted otherwise than *bona fide*. We are inclined to think that they must have honestly believed, perhaps on advice, that they could get the relief they wanted in the writ petitions. Writ petitions are, no doubt, not encouraged when alternative remedies are available. But the exercise of the discretion by the various High Courts in this matter has not been uniform, though certain propositions in regard to that matter may be considered to have got recently settled. We cannot as we think, approach the question of sufficient cause from the result of the writ petitions either. No doubt there was a delay of about thirty days in filing the appeals even after the result of the writ petitions was known. But that in the circumstances, is explainable. Apparently, they were waiting for copies of the orders of High Court in the writ petitions. The long delay, we are inclined to think, in filing the appeals was more due to the time taken by the pendency of the writ petitions in this Court.

We are of opinion that, on the facts and circumstances of these cases, the delay ought to have been condoned. The petitions are allowed. The orders of the Appellate Assistant Commissioner and of the Tribunal are set aside and the Appellate Assistant Commissioner is directed to take the appeals on his file and dispose of them in accordance with law. No costs.

S.V.J. *Petitions allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—MR. JUSTICE P. RAMAKRISHNAN.

P. N. Ganesan .. *Petitioner**

v.

The State of Madras represented by the Special Tahsildar, Harijan Welfare, Tiruvarur, Thanjavur Dt. .. *Respondent.*

Land Acquisition Act (I of 1894), sections 4 (1), 5-A, 17 (1) and 17 (4)—Individual notice under section 4 (1) to land-owners—If obligatory—Lands planted with casuarina trees—If "arable" lands—Question of urgency for dispensing with section 5-A enquiry—Justiciability.

Individual notices to the owners of the land proposed to be acquired, of the notification under section 4 (1) of the Land Acquisition Act is not obligatory. In fact, section 4 (1) only requires that the notification should be published in the official gazette and the Collector is required to give public notice of the substance of the notification at convenient places in the locality.

It is true that section 17 (4) read with section 17 (1) requires that the urgency clause shall be applied only when the land proposed to be acquired is waste or arable. But merely because there are casuarina trees in the land proposed to be acquired, it will not cease to the arable. Even assuming that lands planted with casuarina trees may not fall within the meaning of lands cultivated with annual crops, still the lands will satisfy the definition of "arable".

The question of urgency is for the subjective satisfication of the Government and the Court dealing with the matter under Article 226 of the Constitution can only interfere where the reasons relied on by the Government are entirely irrelevant for the purpose, so as to constitute no reasons at all, or where there is *mala fides*.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the proceedings of the respondent relating to the acquisition of the petitioner's land in R. S. No. 185/6B, 185/8B and 185/15B of an extent of about 35 cents in No. 98, Pinnathur village, Tiruthuraipundi Taluk, Thanjavur District and quash the same including the award dated 27th May, 1963.

T. R. Venkataraman, for Petitioner.

The Assistant Government Pleader, for Respondent.

The Court made the following

ORDER.—The petitioner who is the owner of three survey numbers, R. S. Nos. 185/6B, 185/8B and 185/15B, in Pinnathur village, is aggrieved against the acquisition of 19 cents out of the above three survey numbers by the respondent, State of Madras, for the purpose of opening a pathway to the Harijan colony. The respondent issued section 4 (1) notification, and along with it, it was also announced that as the matter was one of urgency, the enquiry under section 5-A would be dispensed with. Thereafter, the declaration under section 6 was notified on 20th March, 1963. The petitioner contends that he came to know of these acquisition proceedings only a long time later in 1965 when he found people attempting to plant stones for marking the pathway and that thereafter he filed the present writ petition under Article 226 of the Constitution seeking for the issue of a writ of *certiorari* questioning the land acquisition proceedings.

The petitioner's contentions, on which he seeks relief are three-fold: (1) Before a declaration of intended acquisition is made under section 4 (1), it is obligatory that individual notice is given to the land-owners. That was not done in this case.

* W. P. No. 170 of 1965. 31st August, 1967.

(2) The application of the urgency clause, which will have the effect of dispensing with the enquiry under section 5-A, in the present case, is improper because there are casuarina trees on the land and consequently the land is not arable land or waste land ; only under the latter condition does section 17 (4) of the Act read with section 17 (1) permit the invoking of the urgency clause dispensing with the section 5-A enquiry. (3) There are no adequate reasons at all for resorting to the urgency-clause, because the Harijans have been in occupation of the village for a long time using the existing pathway facilities, and there was no urgency in the above circumstances for acquiring the lands after dispensing with the enquiry under section 5-A. It is urged that the urgency clause was applied in this case without the authorities applying their mind at all to the question, and without any evidence to justify the application of the urgency clause.

Regarding the first objection, decisions of this Court have held repeatedly that individual notice to the owners of the land proposed to be acquired of the notification under section 4 (1) of the Act is not obligatory. In fact, section 4 (1) only requires that the notification should be published in the Official Gazette and the Collector is required to give public notice of the substance of the notification at convenient places in the locality. The counter has stated that notice was published by beat of tom-tom in the village and was also published in the village. In the decision in *Krishna Reddiar* v. *State of Madras* [1] which follows two earlier unreported decisions in W.P. No. 219 of 1963 and W.P. No. 1846 of 1965, it has been held that individual notice is not obligatory of the notification under section 4 (1) of the Act, to the owners of the land. Therefore, this objection is without substance.

It is alleged that there are casuarina trees on the land and that therefore this would not make the land arable or waste land, and therefore the application of the urgency clause is improper. Section 17 (4) read section 17 (1) requires that the urgency clause shall be applied only when the land proposed to be acquired in waste or arable. in *Muthuswami Servai* v. *State of Madras* [2], a Bench of this Court has held that the dictionary meaning of 'arable' is land fit for tillage and the word is derived from a Latin word *arablis*, *arare* meaning plough, and that wet lands, even though under paddy cultivation, are obviously fit for tillage or plough. Even assuming that lands planted with casuarina trees may not fall within the meaning of a land cultivated with annual crops (casuarina is usually cut after six or seven years of growth), still the lands, in my opinion, will satisfy the definition of 'arable'. In *E. K. Pattabirama Reddiar* v. *Special Deputy Collector for Land Acquisition, Madras* [3], Srinivasan, J., held that a land upon which fruit bearing trees had been exclusively raised will still be arable land, and he observed that it was not unusual to have cultivation in the open spaces between the trees in a thope, and, to say therefore, that a land upon which trees stand is not arable or cultivable land does not appear to accord with any sense of the term. I am of the opinion that the existence of casuarina trees on the land would still bring the land under the classification of arable and.

On the third point about urgency, the counter-affidavit of the Government states that the Harijan families living in the Harijan colony do not have the benefit of a regular pathway from their houses to the adjacent road and that till new there are only the ridges of the fields which could not be used at all during rainy seasons and at the time of the standing crops. The connected file also shows that the Collector Had reported, after necessary enquiry, that harijans were experiencing difficulties for want of a proper pathway and that consequently the urgency provision was being resorted to. Learned Counsel for the petitioner urges that these difficulties were

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1. W.P. No. 2077 of 1964.
2. W.A. No. 86 of 1967.
3. W.P. No. 322 of 1963.

not suddenly discovered, but must have been in existence for a long time and consequently the application of the urgency clause by reason of these difficulties must be considered to be justified. As against this it is pointed out that the question of urgency is for the subjective satisfaction of the Government: *vide* the Bench decision in *The President, Nagamalai Colony Formation Association* v. *State of Madras*[1], and the Court dealing with the matter under Article 226 of the Constitution cannot substitute its own opinion for that of the Government in the matter. It can only interfere where the reasons relied on by the Government are entirely irrelevant for the purpose, so as to constitute no reasons at all, or where there is *mala fides*. But it cannot be held that the reasons stated above to the effect that the Harijans have no pathway to reach the road from their village and that they are experiencing great difficulties on that account, are either unrelated to the purpose in view or *mala fide*. In the above circumstances, I am of the opinion that the resort to the urgency clause cannot be considered to be without jurisdiction in the present case.

For the foregoing reasons the writ petition is dismissed. There will be no order as to costs.

V.K. — *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—MR. M. ANANTANARAYANAN, *Chief Justice* AND MR. JUSTICE P. RAMAKRISHNAN.

Messrs. Swami Motor Transports (P.) Ltd., Thanjavur .. *Petitioner**

v.

Messrs. Murugan Transports, Tiruchirappalli and others .. *Respondents.*

Motor Vehicles Act (IV of 1939) *(as amended by Madras Act III of* 1964), *sections* 48 (3) (xxi) *(a) and* 57 (8)—*Effect of amendment introduced by Madras Act (III of* 1964)—*Applicability of amended provision to pending applications for variation of a route—Scope of section* 57 (8).

Constitution of India (1950), *Article* 226—*Writ petition—Delay and laches.*

By the amendment of section 48 (3) (xxi) (*a*) of the Motor Vehicles Act by Madras Act (III of 1964) the Regional Transport Authority was clothed with a power to vary, extend or curtail the route, but with a restriction that the variation should not exceed twenty-four kilometres. This restriction, introduced for the first time by the amending Act, would apply also to applications for variation of a route pending when the Madras Act (III of 1964) came into force: The Legislature intended to place a wholesome restriction, in the interests of the public, so that the variation should not swallow up the original route by its length, and so that the foundation itself is not lost sight of, in an unwieldy superstructure; that was the ground for the salutary limit of twenty-four kilometres. The power cannot be construed differently because the Regional Transport Authority is dealing with an application filed before the amending Act came into force, unless a right had expressly accrued and had been saved, in favour of the concerned party.

The language of section 5 (2) of the Madras Act (III of 1964) makes a very clear distinction between a proceeding taken for the grant of a variation and an order passed granting the variation. A proceeding taken prior to the amending Act, is to be deemed to have been valdily taken; in other words, all those procedures on the application were valid and need not be gone through again. In the same way, an order passed prior to the amending Act is to be deemed as passed in accordance with law, notwithatanding the restriction of 24 kilometres. But where the application alone was pending at the time of the amending Act,

1. I.L.R. (1965) 1 Mad. 741.

*W.P. No. 3744 of 1965. 7th September, 1966.

it is difficult to see how, unless a right had accrued to the party to have that application dealt with under the unamended law, section 5 (2) would entitle the party to a variation in excess of the power.

On the plain interpretation of the language of section 5 (2) of the amending Act, there can be no doubt that the prospective part of the amending Act applies to applications filed after the commencement of the Act and also to all orders on applications already filed, which are to be taken as validly instituted, but upon which orders have to be passed subsequent to the amending Act. Indeed, if the intention of the Legislature had been otherwise, there should be very express language, saving the accrued right under the unamended law in favour of the party who had earlier filed the application.

Section 57 (8) of the Motor Vehicles Act is only procedural and not substantive; it is not an independent source of power and the Regional Transport Authority has no authority, under this sub-section, to ignore the restriction on its power, placed by the legislative amendment. That will be the case whether the petition for variation emanates from a party or the matter is taken up by the Regional Transport Authority *suo motu*.

Thus, after the amending Act, no variation can be actually sanctioned disregarding the restriction attaching to 24 kilometres; nor has the Regional Transport Authority any independent source of power to sanction unlimited variation under section 57 (5) and (8) of the Motor Vehicles Act.

There is no rule of law that a writ petition cannot be filed without some delay or that the delay cannot exceed a particular time-limit, such as six months. Courts have held that six months would be a reasonable time for a party to invoke jurisdiction under Article 226 of the Constitution but, naturally, everything will depend on the circumstances.

In the present case, there were several features explaining the delay of nine months. There have been no such laches as would disentitle the party to relief under Article 226 of the Constitution.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records of the Regional Transport Authority, Thanjavur, in R. No. 9387 A-2/63 and quash the order, dated 21st July, 1964 and made therein.

S. Mohan Kumaramangalam, Advocate-General for *G. Ramaswamy*, and *M. Kalyanasundaram*, for Petitioner.

M.K. Nambiar for *N. G. Krishna Ayyangar*, for Respondent 1.

The Order of the Court was made by

Anantanarayanan, C. J.—This proceeding by Messrs. Swami Motor Transport (P.) Ltd., for the issue of a writ of *certiorari* quashing the respective orders of the Regional Transport Authority, Thanjavur, and the State Transport Appellate Tribunal, granting a variation of the route from Nagarapatti to Tirukattupalli (*via*) Thanjavur, etc., involves two related questions of law, that are of some interest and importance. A brief statement of certain essential facts and dates will suffice, as constituting the background in which the problems have to be viewed.

In May, 1961 Government passed an order (G.O. Ms. No. 1486) sanctioning the variation, or directing it as in the public interest. Originally, a certain A. P. Subbu Reddiar applied for this variation, and there was a judgment of this Court in Writ Petition Nos. 774 and 775 of 1961, directing the Regional Transport Authority to deal with the application for variation, ignoring the Government order or administrative fiat. Messrs. Murugan Transports Limited (first respondent) obtained a transfer of permits from A. P. Subbu Reddiar, and applied in March, 1963, for this variation. The variation was held necessary, by the Regional

Transport Authority, Tiruchirappalli, on 11th July, 1963. As a result of Writ Petition No. 808 of 1963, filed by Messrs. Swami Motor Transports (P.) Ltd. (present petitioner), the Regional Transport Authority, Thanjavur, was directed to decide the matter independently, without being influenced either by the decision of the Regional Transport Authority, Tiruchirappalli, or the Government order that we earlier referred to.

With reference to the application for variation by Messrs. Murugan Transports Ltd. (first respondent) this was notified by the Regional Transport Authority, Thanjavur, on 3rd May, 1964, and the extension itself was granted on 11th August, 1964. In the meantime, on 19th February, 1964, Madras Act (III of 1964) had been passed, amending the Motor Vehicles Act in certain important respects. This Act will be the subject of subsequent analysis, but, for the present, it is sufficient to note that by the amendment of section 48 (3) (xxi) (*a*) the Regional Transport Authority was clothed with a power to vary, extend or curtail the route, but with a restriction that the variation should not exceed twenty-four kilometres. In the present case, it undoubtedly does so, and one vital question is, whether, after this Act came into force, the Regional Transport Authority, Thanjavur, would have the jurisdiction to sanction such variation on 11th August, 1964.

On 24th August, 1964, Writ Petition No. 1290 of 1964 was filed by the petitioner Messrs. Swami Motor Transports (P.) Ltd., to quash the order, but it was dismissed, on the ground that there was an alternative remedy before the State Transport Appellate Tribunal. But this concerned revision proceeding (R.P. No. 133 of 1964), was dismissed by the Tribunal on 24th December, 1964, on the ground that it did not possess revisional jurisdiction. The present writ petition was filed by Messrs. Swami Motor Transports (P.) Ltd., on 6th September, 1965, with a delay of about nine months which is also one of the grounds, adverted to during the arguments, for the dismissal of the writ proceeding.

We cannot better illustrate the two related problems of law presented against the background of these facts, by Sri M. K. Nambiyar on behalf of the first respondent and the learned Advocate-General for the petitioner, than by a terse conspectus of the arguments themselves. But before we proceed to these, we may note another development, apart from Madras Act (III of 1964). This is that in Writ Petition Nos. 83, 87, and 163 of 1964, Veeraswami, J., has occasion to refer to the Full Bench decision in *Natesa* v. *Dhanapal Bus Service (P.) Ltd.*[1], and to the following development of the law embodied in amending Act (III of 1964). In expounding these significant changes in the structure of the law of motor transport in this State, the learned Judge made one observation, though it was, in a certain sense, incidental to his reasoning, and not the substance of it. The essential dictum is as follows :—

> "Where the (Regional Transport Authority) exercise its administrative power under clause (xxi) (*a*) of sub-section (3) of section 48, it is subject to the limitation embodied in the proviso above referred to. The proviso does not, however, appear to limit the quasi-judicial power of the Regional Transport Authority under section 57 (8)."

It is undisputed that Madras Act (III of 1964) was enacted, to do away with the anomalies and difficulties that arose in the actual working of the law of motor transport, because of the Full Bench decision in *Natesa* v. *Dhandapal Bus Service (P.) Ltd.*[1]. A related decision which is also pertinent, is the Division Bench decision in *Kuppuswamy* v. *Ramachandran*[2], a judgment of Ramachandra Ayyar, C.J. and one of us. The learned Advocate-General has drawn our attention to the statement of objects and reasons made in the Legislature, at the time of introducing of the Bill by the Minister for Industries, which sufficiently explains the situation in which the amending Act was felt to be essential. Indeed, the following outline of the situation

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1. (1964) 2 M.L.J. 23 : I.L.R. (1964) 1 Mad. 288 (F.B.).
2. (1963) 2 M.L.J. 355 : I.L.R. (1963) Mad. 627.

was common ground during the arguments. *Natesa* v. *Dhanapal Bus Service (P.) Ltd.*,[1] was itself the consequence of the conflict created by the grant of variations of permits, treating the route as a condition of the permit, by Regional Transport Authorities, on the one hand, and on the other the introduction of section 48, sub-clause (2) by Central Act C of 1956. *Jagadisan, J.*, observed in the crucial portion of the judgment at page 295 as follows :

> "The phraseology of section 48, is in our opinion, quite explicit and leaves no room for doubt that the route is not a condition of the permit............ The provision emphasises that the route is part of the permit itself and not its mere appendage. It seems to us that as regards the stage carriage permit the route is of its essence and a permit without a route would be a mere husk without grain."

The learned Judge, delivering the judgment on behalf of the majority, then stressed that it was curious that even after the amendment by the Centre in 1956, the Madras Amendment under section 48-A, still retained its original form. Two other parts of this judgment, which are of some importance for our present analysis are an earlier part where the learned Judge extracts rule 208 of the rules framed under the Act, and a later part where he stresses, that, for reasons given, section 57 (8) ought to be construed as purely procedural, and not as a substantive provision, which embodies any independent source of power. *Kuppuswamy* v. *Ramachandran*[2], held that an application for an alteration of a permit, which would enable the permit-holder to take up an altered route and reach a new destination, must be construed as one for the grant of a new permit, and not as a mere variation. The State Transport Appellate Tribunal had no jurisdiction to grant such an application.

The indisputable consequence was that Government found it necessary to amend the Act, so that the practice of granting variations could be brought within the law. Madras Act III of 1964, sought to do this, and its provisions are vitally significant, for the present arguments. Section 48 (2) was deleted. In sub-section (3) of section 48, a new clause (3) (1-*a*) was introduced, to the effect that the stage carriage should be used *only on a specified route or routes or in a specified area.* Next, for sub-clause (*a*) of clause (xxi) clauses were substituted to enable the Regional Transport Authority to vary, extend or curtail a route, but introducing a restriction of twenty-four kilometres in respect of both variation and extension. Sections 48-A, 51-A, and 56-A of the principal Act were deleted by section 3 of the Amending Act III of 1964.

In view of the relevance and importance of this, we set forth *verbatim* below the changes introduced in sub-section (3), and the text of section 4 of Madras Act III of 1964 amending section 57 (8) of the principal Act, and also of section 5 (1) and (2) of the Madras Act III of 1964.

"(ii) in sub-section (3) :—

(*a*) Clause (i) shall be numbered as clause (i-a) and before that clause as so renumbered, the following clause shall be inserted, namely,

'(i) that the stage carriage or stage carriages shall be used only on a specified route or routes or in a specified area.'

(*b*) for sub-clause (*a*) of clause (xxi), the following sub-clauses shall be substituted, namely :—

'(*a*) vary, extend or curtail the route or routes or the area specified in the permit:

Provided that in the case of—(1) variation, the termini shall not be altered, and the distance covered by the variation shall not exceed twenty-four kilometres;

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1. (1964) 2 M.L.J. 23 : I.L.R. (1964) 1 Mad. 288 (F.B.).

2. (1963) 2 M.L.J. 355 : I.L.R. (1963) Mad. 627.

(2) extension, the distance covered by the extension shall not exceed twenty-four kilometres from the termini;

(*aa*) vary any other condition of the permits';

* * * * * *

4. In sub-section (8) of section 57 of the principal Act, after the words ' by the inclusion of a new route or routes or a new area,' the words 'or by the variation, extension or curtailment of the route or routes or the area specified in the permit ' shall be inserted.

5. (1) Notwithstanding anything contained in the principal Act, the route or routes or the area specified in every stage carriage permit granted before the commencement of this Act shall be deemed to be a condition attached to such permit under sub-section (3) of section 48 of the principal Act, as if this Act were in force on the date of grant of such permit.

(2) Notwithstanding any judgment or order of any Court, all proceedings taken for the grant of and all orders passed granting, any variation, extension or curtailment of the route or routes or the area specified in a stage carriage permit before the commencement of this Act by the State Transport Authority or by a Regional Transport Authority or by an authority or person to whom the powers and functions of the State Transport Authority or a Regional Transport Authority have been delegated or by an authority exercising the powers of appeal or revision against the orders of the State Transport Authority or a Regional Transport Authority, shall not be deemed to be invalid merely by reason of the fact that the State Transport Authority, or the Regional Transport Authority, as the case may be, had no power to grant such variation, extension or curtailment and all such proceedings taken or orders passed shall be deemed always to have been validly taken or passed in accordance with law notwithstanding the distance covered by the variation or extension exceeded twenty-four kilometres."

It is now feasible to set forth, very briefly, the arguments of Sri M. K. Nambiyar for the first respondent. We think it is sufficient and expedient to set forth these arguments first, as the crux of the argument of the learned Advocate-General for the petitioner, is very simple; it is that as amending Act III of 1964 has come into force, the Regional Transport Authority, Thanjavur, had no jurisdiction to grant this extension. Such an extension, exceeding twenty-four kilometres, could not be granted after the amending Act, even on the strict interpretation that the amending Act is prospective, and not retrospective. The only other source of power, section 57 (8) is not an independent source of power, not even a substantive section, but is purely procedural. The incidental observation of Veeraswami, J., in the judgment that we earlier referred to, has to be dissented from. There is no such independent source of power, as the learned Judge apparently thought, with regard to applications which fell within the scope of section 57 (8) of the Act. We may say that the present proceeding is itself on a reference by Veeraswami, J., on a representation before him that his dictum needed reconsideration.

Hence, it is the argument of Sri Nambiyar per contra, that has to be clearly set forth, for the two legal issues, which are of course, inter-related, to be made evident. Sri Nambiyar would divide the development of the law on this aspect into two stages. There was a stage of the law prior to Central Act C of 1956. This was that the route was a condition of the permit under section 48 (*d*) (ii) (*a*) as it then stood, and that there was no power to grant a variation embodied in section 48. By Madras Amendment, section 48-A, introduced a power of variation, and there was also the identical power under rule 208, that we earlier referred to. By virtue of section 48 (2) introduced by Central Act C of 1956, the route ceased to be a condition of the permit, and the conflict between practice and the law, rendered the Full Bench reference essential. By virtue of the judgment of the Full Bench, as we have already seen, the position was rejected that a route could be regarded as condition of the

permit; section 48-A was rendered inoperative, and power to grant variation was thus taken away. Section 57 (8) was not an independent source of power, but was held to be purely processual. The developments of the law led to Madras Act III of 1964.

Section 48-A was repealed by this amendment and the route was made a condition of the permit; it was also to be regarded as a condition of the permit retrospectively, under section 5 (1) of the amending Act, and, in the view of the learned Counsel, both these developments and the wording of section 5 (2) clearly imply that the unamended law is saved, and made applicable, with regard to any application for variation actually entertained prior to the amendment. Learned Counsel would thus put the case for the first respondent on two grounds. Firstly, under section 5 (1) of Madras Act III of 1964.

> " ....route......shall be deemed to be a condition attached to such permit under sub-section (3) of section 48 of the principal Act, as if this Act (amending Act) were in force on the date of grant of such permit."

It is hence stressed, that since the restriction attaching to twenty-four kilometres does not become part of the condition of the permit, by virtue of the deeming provision, because section 48 (3) (xxi) (*a*) had originally no such restriction, the first respondent is entitled to the present variation, which is beyond twenty-four kilometres. Another limb of this argument is that under section 5 (2) of Madras Act III of 1964, the Legislature has not merely saved an order passed granting a variation, prior to the amending Act, but also any application prior to it *shall be deemed always to have been validly taken*. Hence, the variation is perfectly competent, and must be sustained. The second aspect of the argument is that section 57 (8) is an independent source of power, on a doctrine of implied power in relation to section 57 (5), that the view of Veeraswami, J., is, therefore, correct, and that the observations in the Full Bench judgment, to the contrary, must be construed as *per incuriam*. Section 57 (5) was apparently not brought to the notice of the learned Judges of the Full Bench, and a decision given ignoring that vital aspect, should not be construed as binding on us.

We have very carefully considered these arguments in the light of the authorities placed before us. We have no doubt whatever that they cannot be accepted, and that the sanction of the variation in this case beyond twentyfour kilometres, by the Regional Transport Authority, Thanjavur, after the date of the amending Act, is without jurisdiction and illegal. We have equally no doubt that section 57 (8) is procedural and not substantive, that it is not an independent source of power, and that the Regional Transport Authority has no authority, under this sub-section to ignore the restriction on its power, placed by the legislative amendment. That will be the case, whether the petition for variation emanates from a party, or the matter is taken up by the Regional Transport Authority *suo motu*. We shall briefly give our reasons for the conclusions that we have arrived at.

We shall, first of all, dispose of the argument relating to the effect of the deeming provision in section 5 (1) of Madras Act III of 1964, and the plain consequence of section 5 (2) of the said Act. Certainly, Sri Nambiyar is justified in his contention that section 5 (1) is a deeming provision, which creates a legal fiction; in this case, even the route or the area specified in a stage carriage permit granted prior to the commencement of the amending Act, has to be deemed to be a condition attached to such permit under sub-section (3) of section 48. On the effect of a legal fiction, and the manner in which a Court should deal with it, Sri Nambiyar relies upon the famous dicta of Lord Asquith in *East End Dwellings Company* v. *Finsbury, B.C.*[1]. The passage has been frequently quoted, but we think it is pertinent to stress the facts in regard to which those observations came to be made. The Town and Country Planning Act, 1947, laid down, in section 53 (1) (*d*) whereof, that the assessing

1. (1951) 2 All E.R. 587, 599.

authority should deem that the damage to the building had been made good, before the acquiring authority served the notice to *treat*. Where the damage was so extreme as wholly to destroy the original building, Lord Asquith pointed out, that a replacement has to be necessarily imagined, and that, in this case the new building could not be held tied down to the standard rents of 1939. Then follows the passage :

> " If one is bidden to treat an imaginary state of affairs as real, one must surely, unless prohibited from doing so, also imagine as real the cosequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it...... The statute says that one must imagine a certain state of affairs. It does not say that, having done so, one must cause or permit one's imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

But this entire argument appears to us to be somewhat beside the mark, in the present context. Indisputably, the permit in this case was granted prior to the amending Act, and even the application for variation was prior to it. Hence, under section 5 (1) we must deem it that the route was a condition attached to this permit under sub-section (3) of section 48, and consequently that a valid variation could be made. But that variation will also be subject to the new statutory restriction, for two important reasons. Firstly, though this deeming provisions does retrospectively make the route a condition of the permit, the power to sanction the variation is no part of the deeming provision. It flows entirely from section 48 (3) (xxi), whether unamended or as amended. Secondly, the learned Advocate-General, rightly stresses that the words in section 5 (1) *as if this Act were in force on the date of grant of such permit*, make it clear that the legal fiction requires us to consider Madras Act III of 1964, as being wholly in force on the date of the grant of the permit. Therefore, it necessarily implies that the restriction as to twenty-four kilometres was also in force, by h e very emphasis of the principles stated by Lord Asquith.

In this connection, the learned Advocate-General, has drawn our attention to the interesting case of *Director of Public Works* v. *Ho Po Sang*[1]. There, the Court held that at the time of repeal of the Ordinance the lessee had no right to a certificate. On that date, the lessee did not and could not know whether he would or would not be given a re-building certificate. He had not an accrued right to one, and, unless such accrued right is established by the words of the statute the mere fact that the enactment is prospective, cannot give him that right, if no order had actually been passed on the application on the date of the repeal.

This, to our minds, is the proper and manifest interpretation of section 5 (2) also. The language of that sub-section makes a very clear distinction between a proceeding taken for the grant of a variation and an order passed granting the variation. A proceeding taken prior to the amending Act is to be deemed to have been validly taken; in other words, all those procedures on the application were valid, and need not be gone through again. In the same way, an order passed prior to the amending Act is to be deemed as passed in accordance with law, notwithstanding the restriction of twenty-four kilometres. But, where the application alone was pending at the time of the amending Act, we are quite unable to see how, unless a right has accrued to the party to have that application dealt with under the unamended law, section 5 (2) would entitle the party to the variation in excess of the power. In this respect our view is fortified by the authorities or instances. In *Shah Bhojraj Kuverji Oil Mills and Ginning Factory* v. *Subbash Chandra Yograj Singha*[2], their Lordships of the Supreme Court had to consider the effect of the extension of the application of section 12 (1) of Bombay Act VII of 1947 to a particular area. In this context their Lordships observed as follows at page 167 :—

> " But a section may be prospective in some parts and retrospective in other parts. While it is the ordinary rule that substantive rights should not be held to

1. L.R. (1961) A.C. 901.

2. (1962) 1 S.C.J. 377 : (1962) 2 S.C.R. 159.

be taken away except by express provision or clear implication, many Acts, though prospective in form, have been given retrospective operation, if the intention of the Legislature is apparent........

The point of time when the sub-section will operate is when the decree for recovery of possession would have to be passed. Thus, the language of the sub-section applies equally to suits pending when Part II comes into force, and those to be filed subsequently. The contention of the respondent that the operation of section 12 (1) is limited to suits filed after the Act comes into force in a prticular area cannot be accepea."

On the plain interpretation of the language of section 5 (2) we have no doubt that the prospective part of the amending Act applies to applications filed after the commencement of the Act and also to all orders on applications already filed, which are to be taken as validly instituted, but upon which orders have to be passed subsequent to the amending Act. Indeed, if the intention of the Legislature had been otherwise, as we have pointed out, there should be very express language, saving the accrued right under the unamended law in favour of the party who had ealier filed the application.

We are fortified in this view by two other instances. The first is the Madras General Sales Tax Act I of 1959, section 61 whereof was amended by the Act X of 1963. The Legislature expressly stated, after repealing Madras Act IX of 1939, that the repeal of the Act,—

"Shall not affect..........

(*a*) anything done or any offence committed, or any fine or penalty incurred or any proceedings begun before the commencement of this Act; or

(*b*) the previous operation of the said Act or anything duly done or suffered thereunder ; or

(*c*) any right, privilege obligation or liability acquired, accrued or incurred under the said Act............"

Equally explicit are the provisions in section 297 of Income-tax Act XLIII of 1961 repealing the earlier Act XI of 1922. Section 297 (2) (*b*) and (*c*) may be usefully referred to; we do not think it necessary to burden this judgment with *verbatim* extracts. All these besides specifying that the assessment and its continuance, and any proceeding pending when the Act came into force, are to be saved under the old law *as if this Act had not been passed* also preserved *any right, privilege, etc., accrued or incurred* under the said Act. The Advocate-General has also referred to the well-known rule in *Heydon's case*[1], referred to in Craies on Statute Law (sixth edition) at page 96, with regard to interpretation of statutes. The Legislature intended to place a wholesome restriction, in the interests of the public, so that the variation should not swallow up the original route by its length, and so that the foundation itself is not lost sight of, in an unwieldy superstructure; that was the ground for the salutary limit of twenty-four kilometres. The power cannot be construed differently, because the Regional Transport Authority is dealing with an application filed before amending Act came into force, unless a right had expressly accrued, and haa been saved, in favour of the concerned party.

We propose to deal quite briefly with the argument relating to section 57 (8) since we are convinced that this is not an independent source of power, and, indeed, that is settled by the highest authority. We have no doubt whatever that the learned Judge, Veeraswami, J., was not making an elaborate analysis on this aspect, as the foundation of the judgment ; indeed, a perusal of the judgment of the learned Judge will show the contrary, and the learned Judge has refrained from ever categorising section 57 (5) as any independent source of unrestricted power. Sri Nambiyar relies on the doctrine of implied power, which will be found stated in Craies on

1. 76 E.R. 537.

Statute Law (sixth edition) at page 111 in the commentary on *Cookson* v. *Lee*[1]. But this doctrine of the necessary implication or inference of a power that the statute does not specify for which the decision of the Supreme Court in *B. B. L. & T. Merchants' Association* v. *Bombay State*[2], is also cited, has no relevance at all to the present context. No doubt in section 57 (5) we have a reference to the duty of the Regional Transport Authority to dispose of the application *at a public hearing*. Certainly, this must be read along with section 57 (8). But the doctrine of implied power has no bearing here, for the reason that the statute is not elsewhere silent; on the contrary, here the procedure is prescribed, and the very specific source of power is that enacted in section 48 (3) (xxi) (*a*). The statute must be construed harmoniously, and the interpretation cannot be permitted that, where it deals with procedure, it also invests a power in the authority, unfettered by restrictions stated earlier, and independently of it. Again, we have no doubt that the doctrine of a judgment regarded as *per incuriam* for which *Young* v. *Bristol Aeroplane Company*[3], was cited has no application here. As Lord Greene, M.R., points out, a decision given *per in curiam* is where it was given in ignorance of the terms of a statute, and disregarding a statutory provision. There is absolutely no warrant for holding that this is the case with regard to the observations of Jagadisan, J., upon section 57 (8) being entirely procedural. On the contrary, there can be no doubt that the learned Judge was correct in his view of the matter and this is clear from the observations of their Lordships of the Supreme Court in *Abdul Mateen* v. *Ram Kailash*[4], where their Lordships explicitly say at page 67:

> "Section 57 is a procedural section and provides for the procedure in applying for and granting permits........ section 47 (3) gives power ......"

With reference to rule 208, which was also referred to by Jagadisan, J., it has obviously to be read along with section 48 (3) (xxi) which is the source of power, and not independently of it. On both the legal aspects of the matter, therefore, we are satisfied that the writ petition will have to be allowed. After the amending Act, no variation can be actually sanctioned disregarding the restriction, nor has the Regional Transport Authority an independent source of power to sanction unlimited variation under section 57 (5) and (8). Indeed, if he were to be clothed with such power, the total purpose of the legislative amendment will be defeated.

With regard to the laches in the present case, we propose to be quite brief. There is no rule of law that a writ petition cannot be filed without some delay, or that the delay cannot exceed a particular time-limit, such as six months. Courts have held that six months would be a reasonable time for a party to invoke jurisdiction under Article 226 of the Constitution, but, naturally, everything will depend on the circumstances, vide *Mt. Dhaneshwary* v. *L. A. Officer*[5]. In the present case, there were several features as shown in the reply affidavit, explaining the delay of about nine months. The concerned party was ill at Vellore, the revision had been held incompetent, but there was a similar proceeding by another party before the Transport Authority, the outcome of which could be awaited, and there was some delay, on the part of the learned Counsel in communicating the result of the revision proceedings before the State Transport Appellate Tribunal. We are satisfied that there have been no such laches, as would disentitle the party to relief under Article 226 of the Constitution. Accordingly, we direct the issue of a writ of *certiorari* quashing the grant of the variation in this case. No order as to costs.

V.K. *Petition allowed*

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1. (1853) 23 L.J.Ch. 473, 475 (N.S.).
2. (1962) 1 S.C.R. (Supp.) 381 : A.I.R. 1962 S.C. 486.
3. (1964) 2 All E.R. 293.
4. (1963) 3 S.C.R. 523 : A.I.R. 1963 S.C. 64
5. A.I.R. 1966 Pat. 136.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE T. RAMAPRASADA RAO.

Bapu & Company, Madras-1 .. *Petitioner**

v.

The State of Madras (represented by the Joint Commercial Tax Officer, Loane Square Division, Madras). .. *Respondent.*

Central Sales Tax Act (LXXIV of 1956), *sections* 8 (3) (b) *and* 10 (*d*)—*Levy of penalty—When justified.*

The liability to penalty under section 10 (*d*) is not an absolute one. It is only where after purchase of any goods for any of the purposes specified in section 8 (3) (*b*), the purchaser fails, without any reasonable excuse, to make use of goods for any such purpose that he will be liable to penalty. It is only where the use for another purpose is without reasonable excuse, the penalty will be justified. Where reasonable excuse is shown, no penalty could be levied.

On facts *held*, that, possibly because of the old forms (' C' forms in vogue prior to 1st October, 1958) issued to him the assessee was under a misapprehension that even after the amendment with effect from 1st October, 1958, he could use the electrical goods in execution of contracts.

Petition under section 38 of Act I of 1959 praying the High Court to revise the order of the Sales Tax Appellate Tribunal, Madras, dated 17th April, 1964 and made in T.A. No. 1183 of 1962 (Assessment year 1958-59, 1959-60 and 1960-61 Appeal No. C.S.T. 51/62-63), dated 13th October, 1962 on the file of the Appellate Assistant Commissioner (CT) Madras-1; R.C. 6337/60, C. S. T. 828/61-62 O.R. No. 1/62-63, dated 17th July, 1962 on the file of the Joint Commercial Tax Officer, Loane Square Division, Madras.

C. S. Chandrasekara Sastry, for Petitioner.

The Special Government Pleader, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, J.—This petition is directed against the levy of penalty of Rs. 8,978 under section 10 (*d*) of the Central Sales Tax Act, 1956. The petitioner purchased electrical goods between 1st October, 1958 and 31st March, 1961 but under the C. Forms in vogue prior to 1st October, 1958. As the law then stood, section 8 (3) (*b*) included in the C. Form goods intended not only for re-sale but also for use inthe manufacture of goods for sale or for use in the execution of any contract. This provision was amended with effect from 1st October, 1958 and under the amended provision use of goods by the assessee in execution of any contract is not permitted. There is no dispute that the forms actually issued to the assessee were those in vogue as we said prior to the amendment. After the purchase of goods the assessee used them in execution of certain works contracts which he had entered into. On the ground that in doing so he contravened section 10 (*d*), the penalty was levied. The majority members of the Tribunal upheld the penalty. It seems to us that the liability to penalty under section 10 (*d*) is not an absolute one. It is only where after purchases of any goods for any of the purposes specified in clause (*b*) of sub-section (3) of section 8, the purchaser fails, without any reasonable excuse, to make use of goods for any such purpose that he will be liable to penalty. Possibly because of the old forms issued to him, the assessee was under a misapprehension that even after the amendment with effect from 1st October, 1958 he could use the electrical goods in execution of contracts. If it were a case of assessment, he would certainly be governed by the amended section 8 (3) (*b*). That was what was held by the Supreme Court in *Modi S. & W. Mills Co., Ltd.* v. *Commissioner of Sales Tax*[1]. He

* T.C. No. 324 of 1964. 10th, July, 1967.
(Revnu. No. 2287).

1. (1965) 16 S.T.C. 310 : (1965) 1 S.C.R. 592.

could not in that case take cover under the C. Forms which were current prior to 1st October, 1956. But a case of penalty stands on a different footing as the relevant provision itself provides. It is only where the use for another purpose is without reasonable excuse, the penalty will be justified. Where reasonable excuse is shown no penalty could be levied. In a similar case that was the view taken by a Division Bench of this Court in *Viswanathan & Co.* v *State of Madras*[1]. With respect, we share that view.

This petition is allowed. No costs.

S.V.J. — *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

Madura Sugars Staff Union, Pandiarajapuram, representing the workmen of Madura Sugars and Allied Products Ltd. .. *Petitioners**

v.

The State of Madras by its Secretary, Industries, Labour and Co-operation Department, and another ... *Respondents.*

Industrial Disputes Act (XIV of 1947), section 10—Reference under—Principles governing—Government refusing to make a reference—Court's power to interfere.

In making a decision about a reference under section 10 the Government need not confine itself to the Conciliation Officer's report. It can go into other facts which came to its notice and which are relevant for the purpose. The Government can go into the facts and find out whether a *prima facie* case for reference has been made out on the merits. Where there is a disputed question of fact, the Government cannot reach a final conclusion on those facts and it will be for the Labour Court to reach a conclusion. The Government should exercise its discretion *bona fide* in the matter of deciding whether to make a reference or not. When the Government declines to make a reference it is obliged to state its reasons; but it need not record all the reasons in the sense that the reasons should be exhaustive. The reasons which are given should be relevant and should not be extraneous to the subject-matter. If the Government makes a reference, the Court cannot, in a writ petition, go into the question whether it acted properly in making the reference.

There is absolutely nothing in the present case to show that the order of the Government declining to make a reference offends any of the aforesaid principles or is erroneous or without jurisdiction as to merit interference in writ jurisdiction.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *mandamus* directing the first respondent to refer the demands raised by the petitioner for adjudication under sections 10 and 12 (5) of the Industrial Disputes Act, ignoring its earlier G.O.Rt. No. 2658, dated 2nd December, 1964.

K. Venkatasubbaraju for *P. R. Gokulakrishnan* and *K. Vezhavendan*, for Petitioner.

The Assistant Government Pleader, for State.

S. M. Subramaniam for *R. Viswanatham*, for 2nd Respondent.

The Court made the following

ORDER.—This is a writ petition under Article 226 of the Constitution filed by Madurai Sugars Staff Union, Pandiarajapuram, representing the workmen of

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1. (1965) 16 S.T.C. 125 : I.L.R. (1965) 2 Mad. 263.

* W.P. No. 82 of 1965. 29th August, 1967.

Madurai Sugars and Allied Products Limited praying for the issue of a writ of *mandamus* directing the first respondent, the State of Madras, to make a reference to the Labour Court for adjudication under sections 10 and 12 (5) of the Industrial Disputes Act on certain points of difference which had arisen between the workers and the management aforesaid. It appears that during the pendency of the labour dispute there was an attempt at conciliation and that conciliation failed. The Conciliation Officer's report was taken up by the Government for consideration and the Government in its order G. O. Rt. No. 2658, dated 2nd December, 1964, Department of Industries, Labour and Co-operation, summarised the three points in controversy and given reasons as to why the Government was satisfied with the preservation of the *status quo* without a need to refer them to the Labour Court for adjudication. Briefly stated, the first point of dispute was about the revision of dearness allowance. The workers appear to have claimed that the dearness allowance should be related to the cost of living index at shorter intervals than one year. But the Government observed that the adjustment need be made only once a year in accordance with the recommendations of the Wage Board for sugar industries. The second point of dispute was in respect of the payment of minimum wages to casual workers. The Government order stated that there was a settlement arrived at between the parties on 31st May, 1962 under section 18 (1) of the Industrial Disputes Act, and that therefore there was no need for the Government to make a reference for adjudication on this point. The third point of dispute related to the gratuity payable to one Sri Viyakulam. The Government observed that it had been reported that under the existing gratuity scheme Sri Viyakulam did not have the minimum qualifying period of continuous service, and that therefore there was no need to make a reference on this point also.

It was contended by learned Counsel for the petitioner that the Government passed the above order without considering the views of the Workmen's Union. A reference to the record however shows that while passing the order the Government had before it the reports of the Labour Commissioner and the Conciliation Officer. Before the Conciliation Officer the Labour Union was fully represented by the Secretary and the management was also represented. It is therefore not proper to contend that the Government passed the order without having in mind the viewpoint of the Labour Union. In an unreported decision in W.P. No. 564 of 1963, I had occasion to consider the several principles bearing upon the subject and as culled out from the reported cases. The principles were classified as six in number. (1) In making a decision about a reference under section 10 the Government need not confine itself to the Conciliation Officer's report. It can go into other facts which came to its notice and which are relevant for the purpose. (2) The Government can go into the facts and find out whether a *prima facie* case for reference has been made out on the merits. (3) Where there is a disputed question of fact, the Government cannot reach a final conclusion on those facts and it will be for the Labour Court to reach a conclusion. (4) The Government should exercise its discretion *bona fide* in the matter of deciding whether to make a reference or not. (5) When the Government declines to make a reference it is obliged to state its reasons; but it need not record all the reasons in the sense that the reasons should be exhaustive. The reasons which are given should be relevant and should not be extraneous to the subject-matter. (6) If the Government makes a reference, the Court cannot in a writ petition go into the question whether it acted properly in making the reference.

Applying the abovesaid principles to the present case, there is absolutely nothing to show that the order of the Government declining to make a reference offends any of the aforesaid principles or is erroneous or without jurisdiction. The writ petition is dismissed. There will be no order as to costs.

V.K. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE N. KRISHNASWAMY REDDY.

Chelpark Company Limited .. *Petitioner**

v.

The Commissioner of Police, Madras and others .. *Respondents.*

Penal Code (XLV of 1860), section 441—'Criminal trespass'—Act of striking workmen remaining in factory premises even after working hours—If and when amounts to 'Criminal trespass'.

Criminal Procedure Code (V of 1898), section 561-A—Scope—When can be invoked—Police failing to take up investigation in a cognizable offence—Court if can direct police to take up investigation—Powers and duties of police officers—Striking workmen remaining in factory even after working hours and committing cognizable offences—Police failing to take action—High Court can, under section 561-A, direct police to do its duty.

By virtue of their relationship, the employees have got a right to enter the factory premises of the employer at the commencement of working hours and stay and work during working hours and leave at the closing of working hours. Either before or after the working hours, they have no right to occupy the property of the employer. The employees can stay and strike only during the working hours, when they can stay and work. Hence the act of striking workmen remaining in the factory premises after the working hours will amount to seizure and holding of the building, preventing the use of the premises by the employer in a lawful manner. Therefore the workmen remaining in the factory premises after the working hours is unlawful and will amount to trespass.

Whether the act of remaining after the working hours in the factory by the striking workmen will amount to 'criminal trespass' as defined in section 441 of the Penal Code will depend upon the fact whether they had the intention to commit an offence or to intimidate, insult or annoy the employer thereby.

In the present case the striking workmen not only refused to receive the order of interim injunction granted by the Court restraining them from collecting themselves in the factory premises after working hours, but remaining in the premises after the working hours, preventing the employer from closing the premises, obstructing the female employees from leaving the premises, indulging in insulting the members of the staff and intimidating the members of the non-striking workmen, including ladies by using provocative language likely to lead to breach of the peace. Thus, there can be no doubt in the present case that the striking workmen intended to annoy insult, intimdate and commit offences to achieve their ultimate object. Every act done by them was intended, bringing them within the mischief of section 441 of the Penal Code.

Section 561-A of the Criminal Procedure Code. emphasises that the High Court has the widest jurisdiction to pass orders to secure the ends of justice as it is the superior Court of justice. If the High Court feels that in a particular case, the ends of justice require that an order should be made in an application although the application is not contemplated by the Code, it will entertain the application and make the necessary order to secure the ends of justice.

The High Court exercising its extraordinary powers under section 561-A, will take into consideration the gravity of the injustice brought to its notice and the non-availability of an effective remedy otherwise. This power will be used sparingly in deserving cases. Under this power the High Court can direct the executive where cognizable offences are committed or where there is threat to property and person, to take appropriate action to secure the ends of justice.

* W. P. Nos. 2825 of 1967 and Crl. M.P. No. 2250 of 1967. 3rd November, 1967.

It is true that Courts cannot interfere with the investigation by the police, nor can they direct them to proceed with it in a particular manner. Nor can the regularity or the legality of the proceedings in the course of investigation be questioned by the Courts. But, however, if the police refused to take up investigation in a cognizable offence, which is a statutory obligation imposed on them the Court can certainly direct the police to perform its statutory duty to secure the ends of justice.

It is of course true that if an effective alternative remedy is available, the powers under section 561-A cannot be resorted to and that such powers being extraordinary powers, shall be exercised only in exceptional cases where grave injustc is brought to the notice of the Court.

From the provisions of the Madras City Police Act and the Code of Criminal Procedure it is clear that Police Officers have obligations and duties to perform such as dispersing unlawful assembly, preserving peace, detecting and bringing offenders to justice, removing person under certain circumstances and investigating cognizable offences and similar other things. Hence, where, as in the instant case, striking workmen in a factory remained in the factory premises even after working hours and committed cognizable offences, it would be the duty of the police to take appropriate action, failing which the High Court can under section 561-A of the Criminal Procedure Code, direct the police to do its duty no other efficacious remedy being available to the employer.

W.P. No. 2825 *of* 1967 :—Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavits filed therewith, the High Court will be pleased issue a writ of *mandamus* directing the respondents (1 and 2) to evict the twenty-seven persons named in the affidavit from the factory premises of the petitioner at No. 37-L, Mount Road, Madras, after 5-30 P.M. on week days and 1 P.M. on Saturday, and otherwise do their duties.

Crl. M.P. No. 2250 *of* 1967 :—Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue directions to the respondents (1 and 2) to evict the twenty-seven persons named in the affidavit from the factory premises of the petitioner at No. 37-L, Mount Road, Madras, after 5-30 P.M. on week days and 1 P.M. on Saturdays.

V. Rajagopalachari and *V.K. Thiruvenkatachari*, for *King and Partridge*, for Petitioner.

The Public Prosecutor, for Respondents 1 and 2.

S. Mohan Kumaramangalam for *K. T. Paul Pandian* and *G. U. Srinivasalu*, for Respondents 3 to 29.

The Court made the following

ORDER.—The facts and the reliefs prayed for in both these petitions being substantially the same, they are dealt with together. The Criminal Miscellaneous Petition has been filed under section 561-A, Criminal Procedure Code, against the respondents, the Commissioner of Police, Madras, and the Assistant Commissioner of Police (Law & Order), Southern Range, Madras, praying for a direction to the respondents to do their duty and evict the labourers (27 persons) from the factory premises of the petitioner at the close of working hours. The writ petition has been filed to issue a writ of *mandamus* or other appropriate direction to the respondents, praying for the same relief as in Criminal Miscellaneous Petition. It is stated that the writ petition has been filed by way of abundant caution in case it was felt that the Criminal Miscellaneous Petition could not afford and adequate remedy. The petitioner filed affidavits in support of both the petitions. The second respondent filed counter affidavits. The persons who were sought to be removed from the factory premises were impleaded as parties to both the petitions on their applications and they filed their affidavits.

The facts and the circumstances under which these two petitions have been filed are briefly as follows :—

The petitioner is a Limited Company carrying on business of the manufacture of fountain pen ink, having its registered office at No. 37-L, Mount Road, Madras, of which T. V. Advani is the Managing Director, who filed affidavits in support of the petitions. In the office of the petitioner, 21 clerks and others are employed. Adjacent to the office is the petitioner's factory in which 31 workmen are employed.

On the 18th September, 1967, twenty-seven persons mentioned in the affidavit assembled inside the factory and refused to carry out their duties at the instigation of the Union representing the said twenty-seven person and commenced what is called "stay-in-strike".

There is only one shift in the petitioner's factory which is from 8 A.M. to 5-30 P.M. on week days and 8 A.M. to 1 P.M. on Saturdays. Just before the closing hours of the factory on the 18th September, 1967, the striking workmen were requested by the petitioner's representatives to leave the factory premises as they had no authority to remain in the factory after working hours and this request was made as the petitioner wanted to lock up the factory premises after working hours, in which valuable stock-in-trade, machinery, etc. had been kept. As the said twenty-seven persons refused to vacate the factory premises, the petitioner posted its watchman to safeguard the property of the company. It is stated that eighteen of the workmen were willing to continue to work; but they were prevented by the striking workmen from carrying out their duties by obstructing them by surrounding the machinery. The striking twenty-seven persons on 19th September, 1967 obstructed a lorry laden with packing cases consigned to the petitioner from entering the factory and the lorry had to return with the packing cases. On the 21st September, 1967, seven female employees were prevented from leaving the factory and were "gheraoed" for nearly 2½ hours On the 22nd September, 1967, some of the striking workmen surrounded the petitioner's Accountant Mr. R. D. Chellappa and abused him in an attempt to intimidate him.

The petitioner made complaints to the Inspector of Police, 'J' Division, Saidapet, Madras-15, in respect of the incidents which took place on the 18th, 19th, 21st and 22nd September, 1967.

As no effective action was taken by the police, the petitioner filed a suit O.S. No. 3890 of 1967, before the First Assistant City Civil Judge, Madras, for an injunction (*a*) restraining the striking workmen from obstructing the petitioner's lawful discharge of duties and preventing its loyal workers from carrying on their duties; (*b*) restraining the said persons from interfering with the petitioner's business; and (*c*) for a direction to the said twenty-seven persons to leave the petitioner's factory premises after the working hours. Pending suit, on the application filed by the petitioner, the Court granted an interim injunction restraining the striking workmen from collecting themselves in the premises, after the working hours. On 22nd September, 1967, at about 5-15 P.M. the bailiff of the City Civil Court went to the petitioner's factory premises and in the presence of the Police constables sought to serve the order of interim injunction on the striking workmen. As they refused to receive the order, the bailiff affixed a copy of the notice in the notice board of the factory. The striking workmen, even after the order of interim injunction was brought to their notice, refused to leave the factory premises after the working hours. Thereupon, the Managing Director of the petitioner-company contacted the first respondent and requested him to give assistance to the petitioner in evicting the striking workmen from the factory premises. The first respondent referred the petitioner to the second respondent and the 2nd respondent had declined to assist the petitioner. In respect of several incidents that occurred in the factory, the petitioner has been sending complaints to the Inspector of Police, J-1 Police Station, Saidapet for necessary action—vide letters dated 23rd, 25th and 27th September, 1967.

The complaint sent to Inspector of Police on the 27th September, 1967 discloses in detail, several incidents that occurred in the factory premises. The petitioner had requested the Inspector of Police to take appropriate action against the

striking workmen who intruded on his property by scaling compound walls. It is submitted by the petitioner that the striking workmen are guilty of offences or criminal trespass (section 441, Indian Penal Code), criminal intimidation (section 503, Indian Penal Code) and preventing service of summons (section 173, Indian Penal Code). It is further submitted that it is the duty of the police when cognizable offences are brought to their notice, as was done by the petitioner in this case, to take action under the provisions of the Criminal Procedure Code. It is also the duty of the police to evict the striking workmen after working hours from the factory premises as they have committed cognizable offences. As they have failed in their duty, the petitioner prayed that in the absence of satisfactory explanation by the respondents, a direction may be issued to the respondents directing them to do their duty and evict the striking workmen from the factory premises at the close of the working hours.

In the counter-affidavit filed by the second respondent, it is stated in respect of the striking workmen remaining in the factory premises after working hours, it was purely a labour problem governed by the Industrial Disputes Act. In respect of the service of order of interim injunction, the second respondent stated that the striking twenty-seven workmen refused to receive the order of Court from the bailiff and a copy of the order was affixed on the notice board of the factory. It is also stated that the second respondent posted two police constables to do bandobust along with the armed reservemen at the factory premises to prevent any breach of peace which may likey to occur. He gave directions to the Inspector of Police, Saidapet Police Station, to keep close watch over the movements and activities of the striking workmen. The second respondent further stated that he was visiting the factory periodically and found that the workmen had not resorted to any violence or acts of intimidation. According to the second respondent, the striking workmen had not committed any cognizable offence to warrant the interference by them. They had not committed the offence of criminal trespass and there is no duty cast upon the respondents to evict the striking workmen from the factory premises after the working hours. It is also contended that as the matter has been taken to a civil Court and as it is *sub judice* the police cannot take any action.

On behalf of the striking workmen affidavit was filed by one S. Sethuram, the Secretary of the Chelpark Employees' Union and one of the striking workmen. It may not be necessary to mention the details of the affidavit excepting to note that it is admitted that the striking workmen have been staying in the factory premises even after the working hours. It is also denied in the affidavit that the striking workmen refused to receive the copy of the interim injunction order sought to be served on them. It is further stated that the stay-in-strike is legal.

The undisputed facts are these: (1) The striking workmen remained in the factory premises after the working hours; (2) the order of injunction by the City Civil Court restraining them from collecting inside the factory premises after working hours was served on the workmen by affixture of the copy of the order on the notice board of the factory premises;—though in the affidavit filed on behalf of the workmen it is stated that it was not served on them, in the counter-affidavit filed by the second respondent, it is admitted that the service on the workmen was made by affixture; and (3) the petitioner has filed complaints in respect of the incidents which occurred in the factory premises, vide letters dated 23rd, 25th and 27th September, 1967.

The substantial contention raised by the respondents is that the acts alleged against the striking workmen and their remaining in the premises of the factory after the working hours do not disclose a cognizable offence and there was no breach of any statutory duty cast upon the respondents so as to entitle the petitioner to a writ of *mandamus* or a direction under section 561-A, Criminal Procedure Code.

It becomes, therefore, necessary to consider whether the striking workmen remaining in the factory after the working hours, will amount to criminal trespass

and if so, what the duties of the respondents are, to take action in such a case. This question will very much depend upon the fact whether the striking workmen could legally and legitimately remain in the factory premises after the working hours. Even if their remaining in the factory premises after the working hours is unlawful, to bring it within the mischief of section 441, Indian Penal Code, it has to be further considered whether the workman remained unlawfully in the factory premises with any of the intents mentioned in section 441, Indian Penal Code.

It is contended on behalf of the respondent and the workmen that the object of the striking workmen in staying in the factory premises was only to bring pressure on the petitioner to concede the demands and that their stay in the factory premises with that object even after working hours cannot be unlawful and it is further contended that even assuming that such stay by the workmen after the working hours is unlawful, it cannot be said that they have committed the offence of criminal trespass inasmuch as the intention of the workmen was not to annoy, insult or intimidate or commit any offence but to bring pressure on the management to concede the demands as aforesaid. In support of their contention, reliance has been placed on a passage in paragraph 47 of the judgment of the Supreme Court in *Punjab National Bank* v. *A. I. P. N. B. E. Federation*[1], which reads as follows:

"Does the conduct of the strikers as found by the appellate tribunal constitute criminal trespass under section 441 of the Indian Penal Code? That is the next point which calls for decision. It is argued that the conduct of the employees amounts to criminal trespass which is an offence and as such those who committed criminal trespass would not be entitled to reinstatement. According to the Bank the employees committed criminal trespass inasmuch as they either entered unlawfully or having lawfully entered continue to remain there unlawfully with intent thereby to insult or annoy their superior officers. It would be noticed that there are two essential ingredients which must be established before criminal trespass can be proved against the employees. Even if we assume that the employees' entry in the premises was unlawful or that their continuance in the premises became unlawful, it is difficult to appreciate the argument that the said entry was made with intent to insult or annoy the superior officers. The sole intention of the strikers obviously was put pressure on the Bank to concede their demands. Even if the strikers might have known that the strike may annoy or insult the Bank's officers it is difficult to hold that such knowledge would necessarily lead to the inference of the requisite intention. In every case where the impugned entry causes annoyance or insult it cannot be said to be actuated by the intention to cause the said result. The distinction between knowledge and intention is quite clear, and that distinction must be borne in mind in deciding whether or not in the present case the strikers were actuated by the requisite intention. The said intention has always to be gathered from the circumstances of the case and it may be that the necessary or inevitable consequence of the impugned act may be one relevant circumstance. But it is impossible to accede to the argument that the likely consequence of the act and its possible knowledge must necessarily import a corresponding intention..................."

This passage makes it clear that the requisite intention to bring it within the mischief of section 441, Indian Penal Code, has always to be gathered from the circumstances of the case and that the necessary or inevitable consequence of the impugned act may be a relevant circumstance to infer intention. The Supreme Court in relation to the facts held that the intention of the striking workers was not to annoy or insult or intimidate but to put pressure on the employer to concede their demands. The facts of that case are distinguishable from the present case. That was a case of pen down strike. The employees entered the office and were occupying their seats; but were refusing to work during office hours. The strike was wholly confined to the regular working hours. The strike was peaceful and

1. (1960) S.C.J. 999: (1960) 2 S.C.R. 806: A.I.R. 1960 S.C. 160.

non-violent and the employees had done nothing more than occupying their seats during office hours. The strikers never obstructed or prevented the co-workmen from doing their work; nor had the insulted they employers or intimidated them. The only act alleged in that case against the striking workmen was that they refused to vacate their seats when they were asked to do so by the superior officers, during working hours. But in the present case, the striking workmen after having entered the factory premises refused to leave at the close of working hours and remained in the factory premises during day and night. They refused to receive the order of injunction sought to be served on them. It is alleged that the striking workmen have been threatening their co-workers and preventing them from carrying out their duties by obstructing them and by surrounding the machinery. It is also alleged that the striking workmen obstructed a lorry laden with packing cases consigned to the petitioner from entering the factory and they prevented female employees from leaving the factory and that some of the striking workmen surrounded the petitioner's accountant and abused him in an attempt to intimidate him. These facts are borne out by letters written by the petitioner to the Inspector of Police, Saidapet. I am inclined to accept that the incidents mentioned above had occurred in the factory as the Inspector of Police to whom letters were addressed had not controverted the allegations made in the petitioner's affidavit. It can, therefore, be seen that the striking workmen in the present case not only remained after working hours; but also they were not peaceful and non-violent.

The petitioner does not dispute that the stay-in-strike commenced by the workmen is legal; but it is contended that the workmen have no right to stay in the factory premises after the closing hours and their continuance in the factory premises after the closing hours is unlawful. The entry by the workmen into the factory premises during working hours is lawful. Their stay in the factory premises till the closing of the working hours is also lawful. But I am of the view that the striking workmen have no right to remain in the factory premises after working hours and their remaining in the premises after having entered lawfully, is unlawful and it will amount to trespass. It is not in dispute that the factory premises belonged to the petitioner. It is the property of the petitioner. The working hours of the factory are between 8 A.M. to 5-30 P.M. on week days and 8 A.M. to 1 P.M. on Saturdays. By virtue of relationship as employer and employees, the employees have got a right to enter the factory premises at the commencement of working hours and stay and work during working hours and leave at the closing of working hours. Either before or after the working hours, they have no right to occupy they property of the employer. The employees can stay and strike only during the working hours, when they can stay and work. As the employees are entitled to work during working hours, they can refuse to work only during working hours, while they stay and strike. After the closing hours, the employer has to close the factory and make arrangements for the protection of the property. The employer is entitled to possession and protection of his property. The act of the striking workmen in remaining after the working hours will amount to seizure and holding of the building, preventing the use of the premises by the employer in a lawful manner. The employer is practically deprived of his property when the workmen remained on the factory premises after working hours. Therefore, the workmen remaining in the factory premises after the working hours is unlawful and will amount to trespass.

The next point to be considered is whether the act of remaining after the working hours in the factory premises by the striking workmen will amount to criminal trespass. 'Criminal trespass' is defined in section 441, Indian Penal Code, which reads thus :

> "Whoever enters into or upon property in the possession of another, with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit 'criminal trespass.'"

I have found that the entry by the striking workmen into the factory at the commencement of the working hours was lawful; but their remaining after the working hours in the factory was unlawful and will amount to 'trespass.' To bring it within the mischief of this definition, it is necessary to prove that the striking workmen having remained unlawfully in the factory premises, had the intention to commit an offence or to intimidate, insult or annoy the petitioner. It is contended on behalf of the workmen as noted already, that they had no intention to commit any offence or to annoy, insult or intimidate the petitioner; but their object in staying even after the working hours in the factory was only to press the petitioner to concede their demands. I am unable to agree with this contention. It is true that the ultimate object of the striking workmen is to make the petitioner yield to their wishes. But the means adopted to achieve their object must also be lawful. The striking workmen not only refused to receive the order of injunction served on them knowing that the said order was sought to be served; but remained in the premises after working hours preventing the petitioner from closing the premises for protecting and safeguarding his property, obstructing the female employees from leaving the premises, indulging in insulting the members of the staff of the petitioner and intimidating the members of the staff of the non-striking workmen including lady members by using provocative language likely to lead to a breach of the peace. These acts were intentionally done by them for the demand of their ulterior end. Some of the acts committed by them would amount to offences under sections 341, 503 and 504, Indian Penal Code. It is no doubt, true that if an act is done knowing that a particular result is likely to follow in consequence of such act, it cannot be said that such consequences were intended, unless the facts of a particular case warrant such an inference. The intention is subjective. It cannot be proved; but can only be inferred from the facts and circumstances of the case. Taking into consideration the circumstances of this case, I have no doubt in my mind that the striking workmen remaining after working hours, intended to annoy, insult, intimidate and commit offences, of course, to achieve their ultimate object of bringing pressure on the petitioner to concede to their demands. Every act done by them was intended, bringing them within the mischief of section 441, Indian Penal Code. These striking workmen had committed criminal trespass by unlawfully remaining in the factory premises after working hours.

The learned Counsel for the striking workmen relied upon the following observaion made by the Supreme Court in *Punjab National Bank* v. *A. I. P. N. B. E. Federation*[1]:

"Even if we assume that the employees' entry in the premises was unlawfu or that their continuance in the premises became unlawful, it is difficult to appreciate the argument that the said entry was made with intent to insult or annoy the superior officers."

This observation, as stated already, was made in the context and circumstances of that case. In paragraph 54 of the judgment in that case, we find an indication that the strikers were peaceful and non-violent and had done nothing more than occupying their seats during office hours.

In the context, it is worthy to note the following passages in the judgment of the Supreme Court of United States in *National Labour Relations Board* v. *Fansteel Metallurgical Corporation*[2], where the employees had resorted to violence and coercion while striking work:

"The employees had the right to strike but they had no licence to commit acts of violence or to seize their employer's plant. We may put on one side the contested questions as to the circumstances and the extent of injury to the plant and its contents in the efforts of the men to resist eviction. *The seizure and holding of the buldings was itself a wrong apart from any acts of sabotage. But in its legal aspect*

1. (1960) S.C.J. 999 : (1960) 1 S.C.R. 806 : A.I.R. 1960 S.C. 160 at 176.

2. (1939) 306 U.S. 240.

the ousting of the owner from lawful possession is not essentially different from an assault upon the officers of an employing company or the seizure and conversion of its goods or the despoiling of its property or other unlawful acts in order to force compliance with demands. To justify such conduct because of the existence of labour dispute or of any unfair labour practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society."

Proceeding further, Hughes, C.J., who delivered the judgment of the majority. observed;

"This was not the exercise of 'the right to strike' to which the Act referred. It was not a mere quitting of work and statement of grievances in the exercise of pressure recognised as lawful. It was an illegal seizure of the buildings in order to prevent their use by the employer in a lawful manner and thus by acts of force and violence to compel the employer to submit. When the employees resorted to that sort of compulsion they took a position outside the protection of the statute."

These two passages were quoted with approval in a recent Mysore case in W.P. No. 1021 of 1967. The Division Bench in that case while considering a petition filed for the issue of a writ of *mandamus* to the Chief Secretary and the Commissioner of Police, Bangalore, held that the striking workmen committed the offence of criminal trespass by staying in the factory premises day and night. The workmen in that case were dismissed by the management and after dismissal they resorted to 'stay-in-strike' and squatted on the factory premises during and after working hours day and night. The learned Counsel for the workmen contended that in the Mysore case, the relationship between the employer and the employee ceased by the termination of service by order of dismissal and that their remaining on the property would amount to trespass; but in the present case, the relationship between the employer and the employees did not cease and that their remaining on the factory premises even after working hours will not amount to trespass. Of course, it is true that in the Mysore case, the workmen were dismissed. It has been held in that case that the dismissed workmen had committed trespass even while they entered into the premises because their services were terminated. In the present case, as already noted, the entry by the workmen is lawful. But their remaining after working hours, when they have no right to stay, will amount to trespass. So far as remaining on the factory premises after the working hours is concerned, it does not make any difference, whether the stay is by the dismissed workmen or by the workmen in service. In W.P. No. 1021 of 1967, the Division Bench of the Mysore High Court has observed as follows :

"We are not concerned in this case with the question as to whether the termination of their employment was legal or illegal. What we are concerned with is the conduct of the dismissed workmen in persisting to remain on the property even after the order of dismissal and *during day and night.* This conduct, in our opinion, as already observed, is not only wholly unjustified but is also illegal bringing the action of such of them as are persisting in such conduct within the four corners of the law."

The emphasis that is laid down in this passage is the workmen remaining on the property during day and night. With respect, I agree with these observations.

In view of the contention raised by the second respondent that there was no breach of any statutory duty cast on the respondents for the issue of direction as prayed for by the petitioner, it is necessary to refer to the relevant provisions of law to ascertain the scope of the obligations and duties of Police Officers.

Besides the powers provided under the Criminal Procedure Code, which would be adverted to presently, the powers and duties of a Police Officer are enumerated in the Madras City Police Act, 1888 (hereinafter called 'the Act'). Section 23 of the Police Act says:

"Every Police Officer shall, for the purpose of this Act, be considered to be always on duty. He shall not engage, without the written permission of the Commissioner in any duty other than his duties under this Act. It shall be his duty to use his best endeavours and ability to prevent offences and public nuisances; to preserve the peace; apprehend disorderly and suspicious characters; to detect and bring offenders to justice; to take charge of all unclaimed property; to seize and impound stray cattle; to collect and communicate intelligence affecting the public peace, and promptly to obey and execute all orders and warrants lawfully issued to him and it shall be lawful for every Police Officer, for any of the purposes mentioned in this section, without a warrant to enter and inspect any drinking shop, gaming-house or other place of resort of loose or disorderly characters."

Under section 41 of the Act, the Commissioner or, subject to his orders, any Police Officer above the rank of head constable, may prohibit any assembly for the preservation of the public peace or public safety. Section 51-A of the Act gives power to the Commissioner of Police to direct removal of certain classes of persons who are about to be engaged in the commission of any offence involving force or violence or punishable under Chapter XII, XVI, or XVII of the Indian Penal Code or in the abetment of any such offence.

Section 154, Criminal Procedure Code, provides that every information relating to the commission of a cognizable offence must be reduced to writing by the officer in charge of the Police Station and signed by the person giving it; section 156, Criminal Procedure Code, empowers such Police Officer to investigate any cognizable case without the order of a Magistrate; and under section 157, Criminal Procedure Code, if an officer in charge of a Police Station has reason to suspect the commission of a cognizable offence, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report, and shall proceed in person, or shall depute one of his subordinate officers to investigate the facts and circumstances of the case. Under Chapter IX of the Criminal Procedure Code, a Police Officer is empowered to disperse unlawful assembly. Section 127 (1), Criminal Procedure Code, reads as follows:

"Any Magistrate or officer in charge of a Police Station may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly."

From the foregoing provisions, it is clear that the Police Officers have obligations and duties to perform, such as dispersing unlawful assembly, preserving peace, detecting and bringing offender to justice, removing persons under certain circumstances, and investigating cognizable offences and similar other things.

It has now to be considered whether this Court has got powers under section 561-A, Criminal Procedure Code, to direct the respondents to evict the striking workmen and to do their duty enjoined on them.

Section 561-A, Criminal Procedure Code, reads thus:

"Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

This section emphasizes that the High Court has the widest jurisdiction to pass orders to secure the ends of justice as it is the superior Court of jurisdiction. This section does not give new powers; but preserves the inherent powers of the High Court. In *Emperor* v. *Nazir Ahmad*[1], the Privy Council considering the object and scope of section 561-A, Criminal Procedure Code, observed as follows:

1. L.R. 71 I.A. 203: I.L.R. (1945) Lah. 1: (1945) 1 M.L.J. 86: A.I.R. 1945 P.C. 18.

"It is not correct to say that section 561-A has given increased powers to the Court which it did not possess before that section was enacted. The section gives no new powers, it only provides that those which the Court already inherently possess shall be preserved and is inserted, lest it should be considered that the only powers possessed by the Court are those expressly conferred by the Criminal Procedure Code and that no inherent power had survived the passing of the Criminal Procedure Code."

The High Court is not only a Court of law but a superior Court of Justice. If the High Court feels that in a particular case, the ends of justice require that an order should be made in an application, although the application is not contemplated by the Code, it will entertain the application and make the necessary orders to secure the ends of justice.

The High Court in exercising its extraordinary powers under section 561-A, Criminal Procedure Code, will take into consideration the gravity of the injustice brought to its notice and the non-availability of an effective remedy otherwise. This power will be used sparingly in deserving cases. I am of opinion that the High Court can direct the executive where cognizable offences are committed or where there is threat to property and person, to take appropriate action to secure the ends of justice. It has been contended by the learned Counsel for the workmen that the powers under section 561-A, Criminal Procedure Code, cannot be invoked to give direction to the Police Officers even in respect of invetigation and appropriate action in cognizable offences as it will amount to interference with the duties of the police. Reliance has been placed on the following passage in *Emperor* v. *Nazir Ahmad*[1]:

"In their Lordships' opinion however, the more serious aspect of the case is to be found in the resultant interference by the Court with the duties of the police. Just as it is essential that every one accused of a crime should have free access to a Court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. In India as has been shown there is a statutory right on the part of the police to investigate the cirumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in an appropriate case........"

What the Privy Council was concerned in that case was whether the proceedings taken in pursuance of the first information report could be quashed under section 561-A, Criminal Procedure Code. It was contended that the first information report did not disclose a cognizable offence and the Police Officer, had taken up investigation without the order of the Magistrate and that such investigation was illegal and that on that account, the proceedings of investigation should be quashed. This decision makes it clear that the Courts cannot interfere with the investigation by the police; nor can they direct them to proceed in a particular manner in investigation. Nor can the regularity or the legality of the proceedings in the course of investigation be questioned by the Courts.

Section 156 (2), Criminal Procedure Code, says:

"No proceeding of a Police Officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate."

1. L.R. 71 I.A. 203 : I.L.R. (1945) Lah. 1 : (1945) 1 M.L.J. 86 : A.I.R. 1945 P.C. 18.

But, however, if the police refused to take up investigation in a cognizable offence, which is a statutory obligation imposed on them, the Court can certainly direct the police to perform its statutory duty to secure the ends of justice. Even in a cognizable offence, if the police do not take up investigation, a Magistrate under section 156 (3), Criminal Procedure Code, may order investigation. When a Magistrate can order investigation, can it be said that this Court has no power to order investigation and direct the police to do its duty. The decision of the Privy Council cannot be taken as laying down the principle that the Court cannot direct the police to investigate any cognizable offence. But what it says is, the Courts cannot interfere with the actual performance of the duties of the police.

The Supreme Court in *State of West Bengal* v. *S. N. Basak*[1], following the principle laid down in *Emperor* v. *Nazir Ahmad*[2], held that the investigation of the cognizable offence cannot be interfered with when no charge has been laid. That was also a case where a petition was filed under sections 439 and 561-A, Criminal Procedure Code, to quash the police investigation on the ground that it was done without jurisdiction.

I am, therefore, of the view that to secure the ends of justice, the High Court in its inherent powers under section 561-A, Criminal Procedure Code, can direct the Police Officer to do his duty which he has failed to do. It is of course true that if an effective alternative remedy is available, the powers under section 561-A, Criminal Procedure Code, cannot be resorted to and such powers being extraordinary powers, shall be exercised only in exceptional cases where grave injustice is brought to the notice of the Court.

It is contended that in this case, alternative remedies are available to the petitioner and that if a cognizable offence is disclosed, the petitioner can move the Magistrate for redress and that the discretionary power of this Court under section 561-A, Criminal Procedure Code, or for issuing a writ of *mandamus* against the respondents could not be invoked. No doubt it is true that the petitioner can move the Magistrate; but I do not think the remedy sought for in these petitions can be achieved expeditiously. The law gives the petitioner a right to approach an executive officer like the police to give him protection and take appropriate action in cognizable offences. The Police Officers alone, when they are satisfied that cognizable offences are being committed, can take expeditious action contemplated by law. The effective remedy which is prayed for in this case is for the removal of the striking workmen after working hours from the factory premises. The Magistrate cannot give a relief for a remedy of this nature; but he may have to direct the police to make enquiry and submit a report and he has to see, any order passed by him, executed through the machinery of the police.

The Division Bench of the Mysore High Court in W.P. No. 1021 of 1967 in negativing a similar contention raised in that case, observed as follows:

"It was lastly contended by the learned Government Pleader that the petitioner shoud have approached the Magistrate for redress and that as he had not availed himself of that alternative remedy open to him under the law, this Court should not use its discretionary power of issuing a writ of *mandamus* against the respondents We do not think that the failure of the petitioner to approach the Magistrate in a particular case either debars him from approaching this Court or debars us from exercising our discretionary power of issuing a writ. The most expeditous remedy contemplated by law and the right of protection given by law is that of approaching an executive officer like the police; the various provisions of the Code of Criminal Procedure and the Mysore Police Act do indicate bifurcation between the powers and duties of the police and those of a Magistrate. The nature of the remedy sought for by the aggrieved party is also a decisive factor. The most expeditious action contemplated by law is an approach to the police

1. (1963) M.L.J. (Crl.) 515 : (1963) 2 S.C.J. 428 : (1963) 2 S.C.R. 52 : A.I.R. 1963 S.C. 447.

2. L.R. 71 I.A. 203: I.L.R. (1945) Lah. 1: (1945) 1 M.L.J. 86: A.I.R. 1945 P.C. 18.

who when they are satisfied that cognizable offences are being committed, can take immediately preventive measures as also punitive measures. In the present case, what has been sought for is a preventive measure, preferably for removal of the dismissed workmen from the premises of the factory to facilitate the working of the factory. Even if a Magistrate were approached by the petitioner, the Magistrate would have to direct the police to make an enquiry and submit a report as to what is required to be done. In other words, the Magistrate himself has got to see that his order is executed through the machinery of the police. That is why in cognizable offences the law requires the police to take action without waiting for the orders of the Magistrate."

With these observations, I respectfully agree.

It is also contended by the respondents that the petitioner should have resorted to the provisions under the Industrial Disputes Act as there is a dispute between the petitioner and the workmen. It appears, under section 10 (1) of the Industrial Disputes Act, the Government alone, if it is of opinion that any industrial dispute exists or is apprehended, may by order in writing refer the dispute to a Labour Court for adjudication. The discretion to refer the dispute is left to the Government. The Government cannot be compelled to refer the dispute. Under section 10 (3) of the Industrial Disputes Act, the Government may prohibit the continuance of any strike or lock-out where an industrial dispute has been referred to the Labour Court, Tribunal or National Tribunal. These provisions make it clear that this remedy is not open to the petitioner though he could apprise the Government of the existence of the dispute. It is further contended that the matter is *sub judice* as the petitioner has gone to a civil Court and the matter is pending before it. The pendency of the suit cannot be a bar for taking action by the police if cognizable offences are disclosed or a breach of the peace is likely to occur. In this case, the order of injunction was passed against the striking workmen from collecting within the factory premises after working hours. The police should have given effect to the order of injunction by dispersing the striking workmen against whom the said order was passed. It is, therefore, not necessary for the police to consider whether any alternative remedy is available to the petitioner or any dispute is pending before any Court. They are only concerned to see whether the incidents complained of disclosed a cognizable offence or at least there are reasonable grounds to believe that such cognizable offences were committed or likely to be committed. If the police had come to the conclusion that the striking workmen had committed a cognizable offence, it was their statutory duty to take appropriate action.

It appears that in this case the respondents have been under the impression that the striking workmen remaining in the factory premises after working hours does not disclose a cognizable offence. If they had known that a congnizable offence was committed, they would have certainly taken necessary action. As I have now found that the striking workmen had committed the offence of criminal trespass and they formed themselves into an unlawful assembly by remaining after working hours in the factory premises, the respondents would take necessary appropriate action. The respondents have got various measures in giving relief to the petitioner. They can direct the striking workmen squatting within the factory premises after working hours to disperse and remove them from the premises of the factory. As already stated, under section 127, Criminal Procedure Code, the officer in charge of a police-station may command any unlawful assembly likely to cause disturbance of the public peace, to disperse. In this case, if the petitioner and the willing workmen had resisted the striking workmen remaining after working hours in the factory, it would have resulted in a breach of the peace. This is a fit case where the respondents can take action under section 127 (1), Criminal Procedure Code. They may arrest the striking workmen as cognizable offences are disclosed and investigate and file charge-sheets, if there is a *prima facie* case. It is a matter for the police in this case to decide what they should do and what course they should adopt in order to give an effective relief to the petitioner.

It is no doubt true that the capital and labour should contribute equally for its development and progress and the rights and interests of both the employer and employees should be protected. But, if they transgress the bounds of law and create an atmosphere likely to affect law and order, which are the foundations of the civilised society, the police should not lag behind to do its statutory duty of taking appropriate action contemplated by law. Otherwise, there will be chaos and confusion in the country affecting the normal avocations of people. The powers and duties of the police are directed, not to the interests of the police, but to the protection and welfare of the public.

As I have found in this case that the striking workmen remaining after working hours in the factory premises committed the offence of criminal trespass and formed themselves into an unlawful assembly, the respondents are directed, to disperse and remove such of those persons who remain in the said premises after working hours, if necessary with the assistance of their subordinate and take such appropriate action as they may think fit in the circumstances of the case. Crl.M.P. No. 2250 of 1967 is allowed.

On the view I am taking in the Criminal Miscellaneous Petition, I do not think it necessary to issue a writ in the nature of *mandamus* to the respondents directing them to do their statutory duty as I am sure that the respondents, being responsible officers, would certainly take necessary effective steps on the lines mentioned in the judgment. With these observations, W.P. No. 2825 of 1967 is dismissed.

No costs.

V.K. *Crl. M.P. allowed; W.P. dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE K. VEERASWAMI AND MR. JUSTICE M. NATESAN.

Qhamrunnissa Begum .. *Appellant**

v.

Fathima Begum and others .. *Respondent.*

Muhammadan law—Gift—Essential requisites—Gift to minor—Requirement as to acceptance—Gift of future property—Validity.

The three essential requisites that have to be complied with for a valid gift under the Muhammadan law are (i) a declaration of gift by the donor, (ii) acceptance of the gift, express or implied, by or on behalf of the donee and (iii) delivery of such possession of the subject of the gift by the donor to the donee as the subject of gift is suceptible of.

There can be no doubt that taking of possession of the subject of a gift may be either actual or constructive and constructive possession is a question of fact depending on the circumstances.

There is nothing in Muhammadan law to prevent a gift of right to property. In such a case the donor must so far as it is possible for him, transfer to the donee that which he gives, namely, such right he himself has. He must evidence the reality of the gift by divesting himself so far as he can of the whole of what he gives.

It is well established that in the case of a gift by a father to his minor child or by a legal guardian to his ward, all that is necessary is to establish a *bona fide*

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* Appeal No. 101 of 1961. 25th February, 1966.

intention to give. No change or transference of possession is necessary. The persons entitled, in order, to the guardianship of the property of a minor are (i) father, (ii) his executor, (iii) father's father and (iv) his executor. If none of them is alive, the Court may appoint any other person as guardian of the property of the minor.

The acceptance of gift on behalf of a minor may be express or implied.

It is well established that a gift cannot be made of anything to be performed *in futuro* or of future property. A gift has to take effect *in praesenti*. For a gift under the Muhammadan law to be valid there must be clear intention on the part of the donor to divest himself *in praesenti* of the subject-matter of the gift.

Appeal against the decree of the City Civil Court, Madras, dated 31st December, 1959, in Original Suit No. 2917 of 1955.

S. K. Ahammed Meeran, for Appellant.

T. S. Krishnamurthi Ayyar, N. C. Raghavachari, N. S. Varadachari, S. V. Kumaraswamy, V. C. Rangadurai and *M. Khaja Mohideen,* for Respondents.

The Judgment of the Court was delivered by

Natesan, J.—This appeal arises out of a suit for partition of the estate of one Haji Mohammed Azamathulla Badsha Sahib who died on 4th January, 1955 at Madras leaving several heirs and considerable movable and immovable properties at Madras and in Arcot, North Arcot district. The plaintiff is one of the daughters of the deceased by his second wife Habeebunnissa Begum whom he had divorced in 1948. The first defendant is another daughter by this divorced wife and defendants 2 and 3 are sons of the deceased by her. The fourth defendant in the suit is a daughter of the deceased by his first wife who died some where in 1938, and defendants 9 to 11 are the daughters of the fourth defendant and minors. The fifth defendant is the third wife of the deceased and the sixth defendant is the minor daughter by the third wife. Defendants 7 and 8 are the fourth and fifth wives of the deceased and they have no issue. The dispute in the appeal relates to: (1) interests shown as owned by the sixth defendant Gulzar in Gulzar & Company, Arcot, valued at about Rs. 15,000, (2) amounts credited in favour of defendants 9 to 11 in the said firm totalling about Rs. 7,000 and (3) a sum of about Rs. 16,000 cash, found in the iron safe at No. 40, Mahmood Shah Bazaar, Arcot, when an inventory was taken on 11th January, 1955. The said house at Arcot with the movable properties therein, valued at Rs. 2,000 had been gifted by the deceased to the minor Gulzar by a registered gift deed Exhibit B-1, on 29th March, 1951. It is the contention of the plaintiff that the amounts and investment in Gulzar & Company in the name of the sixth defendant and minor defendants 9 to 11 really belonged to the estate of the deceased, that there are mere book entries made *benami,* and that the amounts are available for division among the legal heirs of the deceased. On behalf of the sixth defendant and defendants 9 to 11 contra, it is contended that these entries represent completed gifts duly accepted on behalf of the minors and that the said amounts belong to the respective parties and cannot be brought into the general pool for division among the heirs of the deceased. The learned Assistant City Civil Judge rejected the plaintiff's contentions, holding that there was inherent evidence in the book entries relating to the amounts that Azamathulla relinquished his control over the moneys and divested himself completely of his beneficial interest therein and there was evidence of acceptance of the gift on behalf of the donees. As regards the acceptance of the gift on behalf of the donees, there was no difficulty so far as minor Gulzar was concerned, because the donor was her father. In regard to minor defendants 9 to 11, they had their father and the learned Judge founded the validity of the gift holding that there was acceptance of the gift by Azamathulla as the *de facto* guardian of the minors without opposition from the father of the minors who was the legal guardian. The learned City Civil Judge, also upheld the contention of the sixth

defendant that cash of Rs. 16,000 found in the iron safe had also been gifted by the deceased to Gulzar.

We shall first take up for consideration the credits in favour of minor Gulzar and minor defendants 9 to 11 in the firm of Gulzar & Company. The credits in Gulzar & Company, have come on transfer from the tannery business which Azamathulla had been carrying on. It is seen from the records that the deceased first set apart amounts in favour of his there grand daughters that is defendants 9 to 11, and Gulzar on the 31st of March, 1949, Rs. 2,000 for each of the three grands daughters and Rs. 5,000 for his minor daughter, Gulzar. Exhibit B-3 is the day-book of the tannery business for the year 1948-49. The entries have been made by Azamathulla himself, the deceased debiting himself a sum of Rs. 11,000 in all and crediting his daughter and the grand-daughters as aforesaid. The credits are found carried forward in the accounts of the tannery business in the subsequent years and interest is charged and credited. The partnership of Gulzar & Company was started in December, 1953, for carrying on handloom cloth and lungi business and is evidenced by the partnership deed Exhibit B-16. The partners are shown as Azamathulla in the capacity of father and guardian of his minor daughter Gulzar and one Mir Mohideen Basha who has figured as P.W. 1. A sum of Rs. 15,000 was shown as capital contribution by Azamathulla as father and guardian of Gulzar. The credits in the names of defendants 9 to 11 and Gulzar in the tannery business with the interests accrued were transferred from the tannery business to the lungi trade. This way an amount of Rs. 2,609-1-0 was transferred from the closed tannery business to the credit of each of the grand-daughters in the lungi partnership of Gulzar & Company. The amount in the name of Gulzar in the tannery business was similarly transferred to the lungi partnership in her name. A further credit of Rs. 9,000 is found in the name of Gulzar as capital amount brought in through her father. The account books show proper and due adjustments of credits and debits and the credits in the names of the three grand-daughters thereafter continued in Gulzar & Company. In transferring these amounts the transfer is directly in the names of minor defendants 9 to 11 and minor Gulzar. The relative book of account of the tannery business is Exhibit B-9. The first ledger of Gulzar & Company, Exhibit B-11 is for the period from 9th November, 1953, to 31st March, 1954. As the account books stand they clearly show that the money were treated as belonging absolutely to the persons in whose names they are found credited. Azamathulla, the deceased, had his own ledger page in the books of account.

Mir Mohideen Basha, partner in Gulzar & Company, giving evidence for the plaintiff as P.W. 1 admits that in the accounts, Gulzar was shown as a capital contributing partner and the grand-daughters were shown as creditors. So far as Gulzar is concerned, P.W. 1 admits that Azamathulla was looking after the minor daughter in respect of the business. One of the reasons suggested by P.W. 1 for having these moneys *benami* is, that Azamathulla wanted to deprive his divorced wife and her children of any property. If that be the reason, the reason given itself negative any theory of *benami*. If the intention was to deprive some of the heirs of their lawful shares, it could be successfully achieved only by a real gift and not by nominal entries. If he was spiting his divorced wife by depriving her children of shares in his estate he could not secure it better than by gifts in favour of his children by his other wives. The unequivocal and unqualified intention of Azamathulla to immediately benefit his daughter Gulzar and his grand-daughters defendants 9 to 11 is brought in certain declarations of the deceased himself. Exhibit B-13 is a copy of the plaint in Civil Suit No. 237 of 1964 on the Original Side of this Court, a suit instituted for dissolution of the partnership of Gulzar & Company. Azamathulla as the father and next friend of his minor daughter Gulzar filed the suit against the partner, P.W. 1 in the present suit. The plaint refers to the investment by the plaintiff, that is, Gulzar, of Rs. 15,000 as capital and paragraph 19 of the plaint gives a list of the persons who had invested their moneys in the firm

It is pointed out that these persons have to be paid back their moneys. In the list are shown defendants 9 to 11, the amount due to each of them being given as Rs. 2,350. Azamathulla has verified the said averments in the plaint as true to his knowledge. In the said suit Azamathulla has also sworn to an affidavit where it stated in specific terms that the plaintiff, that is, Gulzar, as financing partner had invested Rs. 15,000. The declarations of the deceased Azamathulla in these proceedings are statements against his interest and clearly establish that the deceased regarded these amounts as belonging absolutely to the persons in whose names they stood. They establish that so far as Azamathulla was concerned, he had completely divested himself of all his interest in the funds and had given them to his minor daughter and minor grand-daughters. The only question for consideration is whether they are valid gifts and had been completed according to the principles of Mohamedan Law so as to pass title to the donees.

The three essential requisites that have to be complied with for a valid gift under the Mohamedan Law are (*i*) a declaration of gift by the donor, (*ii*) acceptance of the gift, express or implied, by or on behalf of the donee, and (*iii*) delivery of such possession of the subject of the gift by the donor to the donee as the subject of gift is susceptible of. Learned Counsel for the appellant draws our attention to a decision in *Mahomed Hussain* v. *Aishabai*[1], and submits on the authority of the decision that mere book entries in respect of money which is the subject-matter of a gift is not sufficient to support the gift. It is contended that there must be evidence to show that the donor relinquished his control over the money and divested himself completely of his beneficial interest therein so that he could not have operated on the sum if he wanted to do so. Learned Counsel points out that for a vaild gift under Mahomedan Law there must not only be a declaration by the donor of his intention to make the gift but the subject of the gift must be accepted on behalf of the donee. From the resume of facts stated above, it is clear that this is not a case of gift by mere book entries only. There are clear and unequivocal declarations by the deceased of his having divested himself of all interest in the funds and of his intention of vesting the funds in the donees. There can be no doubt that there has been a clear declaration by the donor of his intention to make the gift and we shall presently consider whether there has been such delivery of possession as the subject of the gift is capable of and whether there has been valid acceptance of the gift by or on behalf of the donees.

There can be no doubt that taking of possession of the subject of a gift may be either actual or constructive and constructive possession is a question of fact depending on the circumstances. In Principles of Mahomedan Law by Mulla, fifteenth edition, at page 136, it is stated:

> "When the subject of the gift is incorporeal property or an actionable claim, the gift may be completed by any act on the part of the donor showing a clear intention on his part to divest himself *in praesenti* of the property, and to confer it upon the donee."

At page 157 the learned author points out that there is nothing in Mahomedan Law to prevent a gift of right to property. In such a case the donor must so far as it is possible for him, transfer to the donee that which he gives, namely such right as he himself has but this does not imply that where a right to property forms the subject of a gift, the gift will be invalid unless the donor transfers what he himself does not possess, namely corpus of the property. He must evidence the reality of the gift by divesting himself so far as he can of the whole of what he gives.

It *Abdul Kareem* v. *Commissioner of Income-tax*[2], this Court referring to the above passage in Mulla's Principles of Mahomedan Law, held that where the subject-

1. A.I.R. 1935 Bom. 84.
2. (1963) 1 I.T.J. 367: (1963) 1 M.L.J. 326: I.L.R. (1963) Mad. 858.

matter of a gift consisted of the assets of the firm, the entries in the accounts followed by such acts as would effectuate a divestment on the part of the donor would be sufficient. In that case a Mahomedan partner of a firm desired to make gifts to his wife and children. There was no sufficient cash balance available so that entries were made in the books of the partnership making appropriate debits and credits. From that day onwards the wife and the children figured as creditors of the firm and interest was paid by the firm to those persons. Learned Counsel appearing for the sixth defendant drew our attention to another decision of this Court in *Abdul Rahman Rowther and Company* v. *Commissioner of Income-tax*[1]. In that case a Muslim assessee to income-tax who was the sole proprietor of business purported to make certain gifts to his two married daughters by incorporating certain entries in his accounts. He debited himself to the extent of Rs. 50,000 and his two daughters with Rs. 25,000 each. Subsequently a partnership deed was executed with the assessee and his two daughters as partners. There was evidence of distribution of the profits of the partnership in accordance with the terms of the partnership. On the question whether the gift was valid and the firm was entitled to registration under the Income-tax Act, it is observed as follows :

> "It must however necessarily depend upon the circumstances of the case whether the actual subject-matter of the gift should be so handed over or anything equivalent thereto, or whether an acknowledgment by the donee that the gift had been received would not suffice to meet the requirements of the law. We are not very much impressed by the argument that here were only book entries."

The learned Judges, after referring to *Abdul Kareem* v. *Commissioner of Income-tax*[2] and the passage from Mulla's Principles of Mahomedan Law above cited proceeded to observe :

> "In the present case also, we have noticed that after making the necessary entries, a partnership document was executed. In that document, the assessee expressly admitted that of the capital of the partnership the two daughters were entitled to Rs. 25,000 each. Here was accordingly a statement made by the assessee against his own interest, which is entitled, in our opinion, to more weight than what the Department has chosen to give to it."

In the instant case, as already pointed out, not only are there book entries but we have subsequent declarations by the deceased in Court proceedings clearly and categorically acknowledging the interest of the donees in the funds. It must be noted that the book entries are not in the account books of the donor himself. So far as the minor Gulzar is concerned, the partnership is formed with a stranger, the minor being shown as the partner advancing capital. All accounts are in her name and the acts of Azamathulla are as guardian and protector. As regards the moneys of defendants 9 to 11 the moneys are transferred from his own books of account relating to his personal business to the partnership business. The partnership business is in law a different entity different from the donor Azamathulla, and defendants 9 to 11 get credit for the amounts due to them in this partnership. The donor in the plaint which he verified specifies them as creditors of the partneship firm. More, moneys have been drawn on behalf of the minors and spent by their mother, and the drawings of interest have been debited in the accounts. Clearly there is such relinquishment of ownership and dominion by the donor and such transference of possession as is possible in the circumstances.

The next question for consideration is whether there has been compliance with the requisites of Mahomedan Law of acceptance of the gift express or implied by or on behalf of the donees. All the donees in this case are minors. So far as Gulzar is concerned as pointed out at the beginning itself there can be no difficulty. It is well established that in the case of a gift by a father to his minor child or by a legal

1. (1965) 1 M.L.J. 265, 267, 268.
2. (1963) 1 I.T.J. 367 : (1963) 1 M.L.J. 326: I.L.R. (1963) Mad. 858.

guardian to his ward, all that it necessary is to establish a *bona fide* intention to give. No change or transference of possession is necessary. The persons entitled, in order, to the guardianship of the property of a minor are: (*i*) father, (*ii*) his executor, (*iii*) father's father and (*iv*) his executor. If none of them is alive, the Court may appoint any other person as guardian of the property of the minor. We have therefore, no difficulty in upholding the validity of the claim of Gulzar, the sixth defendant, to her interest in the firm of Gulzar & Company.

But as regards defendants 9 to 11 Azamathulla, the donor, was not the guardian. The father of the minors was alive and learned Counsel for the appellant relies on a decision of the Privy Council in *Musa Miya* v. *Kadar Bux*[1], for invalidating the gift. In the case before the Judicial Committee the gift was by the grandfather to his minor grandsons by his daughter. There was no transference of possession or relinquishment of possession by the donor and the father of the minors was alive. No doubt the minors were living with their grandfather. Their Lordships held that the recognized exception in the case of a gift to a minor by his father or other guardian from the general rule of Mahomedan Law that a gift is invalid in the absence of delivery of possession coud not be extended to the case where the father of the minors was alive and was actually living with his wife and children and was in a position to exercise his rights and powers as parent and guardian and to take possession of the property on behalf of his children. It must be pointed out, that in that case though the donor publicly announced to his assembled friends that he had made a gift of his property to his minor grandsons, there was no delivery of possession nor any relinquishment of control and thier Lordships posed for consideration the question whether in the absence of delivery of possession or any relinquishment of control the announcement was sufficient to constitute a completed gift according to Mahomedan Law.

The transference of possession or delivery of the subject-matter of the gift in the present case, as already noticed can be and as pleaded is, only constructive. The law as to the requirement of a valid gift in a case of the present kind is clear and of that there can be no doubt. There must be acceptance of the gift by the legal guardian and as delivery can be constructive, the acceptance also may be so. But the question is whether on the evidence it could be inferred in this case that there has been such acceptance of the gift on behalf of the minor donees by their father as is possible and may be expected in the circumstances. The father of the minors, the legal guardian, has given evidence as D.W. 1. He deposes that Azamathulla told him about the gift when originally he gifted the amounts by crediting in the tannery accounts. He also told the witness when he was transferring the amounts to Gulzar & Company, interest accrued on the credits had been drawn and debited against the respective minors. D.W. 1 also speaks to drawing of the interest from the account of each child to the tune of Rs. 300 and his wife making jewels for the children from these moneys. No doubt the requirement of moneys for making jewels for the children was conveyed to Azamathulla not directly by D.W. 1 but through his wife, the daughter of Azamathulla and he had seen the moneys being paid in the hands of his wife.

In *Katheessa Umma* v. *Narayanath Kunhamu*[2], the question of the validity of gift by a husband to his minor wife when the gift was accepted on behalf of the minor wife by her mother arose for consideration before the Supreme Court. Neither the father nor the grandfather was alive. It would have been legal for the donor-husband himself to have accepted the gift on behalf of his minor wife. Upholding the validity of the gift Hidayatullah, J., who delivered the judgment on behalf of the Court observed :

"In our judgment the gift in the present case was a valid gift. Mammotty was living at the time of the gift in the house of his mother-in-law and was probably a very sick person though not in marzulmaut. His minor wife who had

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1. (1928) 54 M.L.J. 655: L.R. 55 I.A. 171 : (1928) I.L.R. 52 Bom. 316 (P.C.).

2. A.I.R. 1964 S.C. 275, 279.

attained discretion was capable under Mahomedan Law to accept the gift was living at her mother's house and in her case there the husband was also residing. The intention to make the gift was clear and manifest because it was made by a deed which was registered and handed over by Mammotty to his mother-in-law and accepted by her on behalf of the minor. There can be no question that there was a complete intention to divest ownership on the part of Mammotty and to transfer the property to the donee. If Mammotty had handed over the deed to his wife, the gift would have been complete under Mahomedan Law and it seems impossible to hold that by handing over the deed to his mother-in-law in whose charge his wife was during his illness and afterwards Mammotty did not complete the gift. In our opinion both on texts and authorities such a gift must be accepted as valid and complete."

In the course of the judgment reference is made to the observations of the Judicial Committee in *Muhammad Abdul Ghani* v. *Fakhr Jahan Begam*[1], where it is observed at page 315 :

"In considering what is the Muhammadan Law on the subject of gift *inter vivos* their Lordships have to bear in mind that when the old and admittedly authoritative texts of Muhammadan Law were promulgated there were not in the contemplation of anyone any Transfer of Property Acts, any Registration Acts, any Revenue Courts to record transfers of the possession of land, or any zamindari estates, large or small, and that it could not have been intended to lay down for all time what should alone be the evidence that titles to lands had passed. The object of the Muhammadan Law as to gifts apparently was to prevent disputes as to whether the donor and the donee intended at the time that the title to the property should pass from the donor to the donee, and that the handing over by the donor and the acceptance by the donee of the property should be good evidence that the property had been given by the donor and had been accepted by the donee as a gift."

Hidayatullah, J., further refers to a decision of this Court in *Alamanayakunigari Nabi Sab* v. *Murukutti Papiah*[2], as pointing out that the Mahomedan Law of gifts, though strict, could not be taken to be made up of unmeaning technicalities. Referring to the principles of Mahomedan Law regarding the completion of the gift it is observed in *Alamanayakunigari Nabi Sab* v. *Murukuti Papiah*.[2]

"The rules of law relating to possession appear abstruse and complex owing to the failure to direct the enquiry to the ultimate use to which the subject of gift has been put and to determine whether or not it was the donee who has derived benefit from the property after the gift. The law is not made up of unmeaning technicalities. It is not abstruse and removed, from the common course of events and human conduct."

It was held in that case that where a Mahomedan made a gift of a field to his minor grandson during the lifetime of his son and at a time when all the three lived together in the same house, the circumstance that possession of the field was not delivered to the minor's father was not fatal to the validity of the gift. In such a case the gift would be valid, if after it was made, the income or other benefit derived from the field was applied to the use of the minor so as to show that a transfer of ownership had been made.

In our view it is a fair deduction in consonance with the common course of events and human conduct that the legal guardian accepted the gift. The donor had, in clear and unambiguous terms, declared the ownership of the minors in the funds in question. The original investment was in his own business in the names of the minors and communicated to the father of the minors who was his son-in-law. The father has stated that he looked into the books and saw the entries therein.

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1. (1922) I.L.R. 44 All. 301 (P.C.) : L.R. 49 I.A. 195 : (1922) 43 M.L.J. 453.
2. (1915) 29 M.L.J. 733, 743.

The donor had informed him of the proposed gift even before making the gifts. The gifts in this case is money with no ownerous obligation attached. It is a benefit conferred by the grandfather who may properly be expected to make such gifts of affection. The interest accrued on the moneys had been drawn and used for the minors. In such circumstances we may fairly and properly conclude in the light of the observations in the judgments cited above, due acceptance of the gift by the legal guardian of the minors. Assent of the guardian in such circumstances is a legitimate inference. As pointed out in Mulla's Principles of Mahomedan Law, the acceptance of a gift by or on behalf of a donee may be expressed or implied. Even taking, that from the evidence it appeared that the subsequent investment of the funds for augmentation and earning of interest was by the donor himself, such conduct may only be as and on behalf of the legal guardian and cannot affect the validity and completeness of the gift. Effect must be given to the investment being in the names of the minors themselves. There is nothing unusual in funds in such circumstances being left with the senior member of the family who is a successful businessman and particularly when he himself happens to be the donor and interested in the welfare and prosperity of the donees. It may be that the legal guardian would be liable to the minor donees if the funds are not properly secured. But that cannot affect the original factum or validity of the gift. We, therefore, hold on the facts that the amounts standing to the credit of defendants 9 to 11 in Gulzar & Company, are the subject of completed gifts in favour of the minors and are not available for partition as part of assets of the estate of the deceased.

The next disputed item is a sum of about Rs. 16,000 found in the iron safe No. 40, Mahmood Shah Bazaar, Arcot. The minor daughter Gulzar claims this amount as belonging to her absolutely as gift in her favour by her father, while it is contended for the plaintiff that it is an asset of the estate and divisible among all the legal heirs. The pleadings of the sixth defendant in regard to this claim are not precise. On the 29th of March, 1951, Azamathulla had executed a gift deed Exhibit B-1, in favour of his minor daughter Gulzar, the validity and completeness of which is not disputed. Thereunder the donor gifted the properties then stated to be in possession, immovable properties bearing door Nos. 37 to 40 in Arcot and movable properties in the buildings bearing the said door numbers. There is specific reference in the gift deed to movable properties in door No. 40, Mahomood Shah Bazaar, Arcot, and mention is made of an iron safe with cash gold jewels *vagaira*. Other furniture and fixtures are detailed and the entire movable properties gifted are valued at Rs. 2,000. The gift deed stated that the donor was bound to protect the house, site and movable properties gifted, conduct repairs, pay taxes, etc., with the help of the properties or with the help of the cash or with the help of income derived from them. It is also stated therein that the donee had right as per Mohomedan Law to inherit future properties other than the properties and cash specified in the deed. The cash of Rs. 16,000 was found in the iron safe which had been gifted along with the house to the sixth defendant that this cash of Rs. 16,000 was in the iron safe at the time of the gift. It is admitted that this cash had been placed in the iron safe subsequently by the deceased. Claim to this amount of Rs. 16,000 is not made as comprised and covered by the gift deed Exhibit B-1. To a specific question from this Court learned Counsel, Sri N.C. Raghavachari appearing for the sixth defendant, stated that his client does not rely on Exhibit B-1, for this claim but her case is that as the safe was gifted to her, whatever cash was deposited in it became gift in her favour *pro tanto*. In the written statement the claim is rested thus :

"The late Azamathulla Badsha has categorically gifted by a registered document not only the house and ground No. 40, Mohammed Shah Bazaar, but also the cash and jewels in the iron safe as well as the movables in the premises and whatever things that were subsequently kept in the said premises were given to the sixth defendant."

The claim as pleaded reads as if the document itself provided for the subsequent things kept in the premises to follow the original gift. But it is well established and is not disputed that a gift cannot be made of anything to be performed *in futuro* or of future property. A gift has to take effect *in praesenti*. The trial Court which found in favour of the sixth defendant got over this hurdle with the following observations :

" The case of Gulzar is not based on Exhibit B-1. Exhibit B-1 has been relied on to show the intention of late Azamathulla on its date to give the iron safe and its contents to minor Gulzar. Azamathulla put money in the safe subsequnetly. Subsequent deposits are quite consistent with his intention to give these moneys to Gulzar. Clearly, the intention evidenced by Exhibit B-1 affords sufficient proof of the subsequent deposits of moneys amounting to gifts."

Apart from its tenability this approach completely overlooks the recital in the gift deed that by the gift the donee had not lost her right to inherit the future properties of the donor. This statement improbabilises, assuming that such plea is legally tenable, any intention of making gifts of the moneys that may be put into the iron safe in the future. An argument is developed that the iron safe is analogous to a savings bank account for Gulzar without a pass-book and moneys put into it are gifts to her as deposits in a bank. We are unable to follow this reasonsing. For gift under Mohomedan Law to be valid there must be clear intention on the part of the donor to divest himself *in praesenti* of the subject-matter of the gift. It may be that where the donor is the father there need not be any transference of possession. But there must be unequivocal declaration of intention to divest himself of the ownership of the subject-matter of the gift. We are unable to read in the written statement a plea that this amount of Rs. 16,000 has been the subject-matter of any specific gift by the donor. Excepting the fact that it is found in the iron-safe which had been gifted by the donor to the donee, there is nothing else to evince his intention to make a gift of the money. There is evidence that the deceased had use of the iron-safe. When the iron-safe was opened moneys belonging to a mosque of which he was the muthavalli were also found there. There is some evidence that jewellery belonging to his jewellery business were also found in the safe. Admittedly the fifth defendant's jewels were kept in the iron-safe. Account books belonging to the mosque were found in the iron-safe and the mosque moneys and the account books were afterwards given away to the mosque. Azamathulla no doubt had a safe in his Triplicane house. But he had business both at Madras and Arcot. Besides the properties gifted to the sixth defendant, he had other immovable properties at Arcot and in the neighbourhood, lands, house and mango gardens. He used to reside also at Arcot. Just prior to his death on 28th December, 1954, at Madras he had a heart attack. It was followed by a second attack on 2nd January, 1955, when he was moved to the General Hospital. There he died on 4th January, 1955. His burial ceremony was at Arcot. It is stated that the key of the iron-safe was under his pillow. It is admitted that there are no entries in any of his account books crediting Gulzar with any amount to which this sum of Rs. 16,000 found in the safe could be related.

The lower Court has placed reliance on the deposition of one Syed Basha Mohideen (D.W. 3) a friend of the deceased, for the finding that there was a gift of the cash in the safe in favour of Gulzar. We have been taken through his evidence and his deposition does not inspire the least confidence. He is a retired Tahsildar and admittedly he used to purchase properties with his own moneys in the name of Azamathulla, for his own benefit. He admits that Azamathulla subsequently transferred these properties to him. This witness had taken active part against the divorced wife in her claim for maintenance and had filed an affidavit supporting the cause of Azamathulla. A reading of his deposition shows that full advantage had been taken of the lack of precision in the pleadings to trim the case in evidence according to what this witness thought was the requirement of law to sustain the

gifts. He speaks to his knowledge of the original gift deed Exhibit B-1. The extent to which he was prepared to go is apparent from his statement that the deceased was saying that he was living in the house of his minor Gulzar as a guest in order to show sincerity of his purpose in making the gift. This witness states that the deceased told him that everything found in the house and the iron-safe, the moneys he had kept there and the moneys he was going to keep there were all Gulzar's property and were gifted to her. He deposes that subsequent to the gift deed the deceased told him that he had kept a few thousand in the iron-safe for the benefit of Gulzar and that he would be depositing more and more in course of time for her benefit. As pointed out already, no such case has been pleaded and the gift deed does not provide for the making of future deposits in the iron-safe for the benefit of Gulzar. The witness would add that so far as the deceased is concerned he would not keep his moneys in the iron-safe and he would be keeping them in the almirah in the drawing room. It is in this drawing room this witness stayed whenever he went to meet the deceased. In fact he states that the deceased told him that whatever money he kept for himself he would keep in the almirah and shelf in the drawing room and not in the iron-safe. Azamathulla was a prosperous businessman having several lines of business and had lungi trade in Arcot, besides lands and buildings. He would have been handling large sums at Arcot. It is difficult to believe that the deceased kept his personal moneys in an almirah in the drawing room while there was nothing to prevent his securing the moneys by keeping them in the iron-safe in his custody. Of course, the letter Exhibit A-1, executed by Rabia Bi, the 5th defendant and mother of Gulzar, when disputes arose can have no bearing on the decision of the question now in issue. Any statement of Rabia Bi at the attempted mediation agreeing to the division of the cash in the iron-safe among the heirs of the deceased cannot bind the minors.

In our view from the mere fact that moneys were placed by the deceased in the iron-safe which he had gifted to his daughter, one cannot infer that there was an intention to gift such moneys. The findings of the Learned City Civil Judge in regard to this sum of about Rs. 16,000 found in the iron-safe cannot be sustained and has to be set aside. We, therefore, hold that item 5 in Schedule B to the plaint is an asset divisible among the legal heirs of the deceased Azamathulla and not the exclusive property of the sixth defendant, Gulzar.

The appeal of the plaintiff allowed to this extent and it is dismissed in other respects. The appellant, and the contesting respondents 9 to 11 one set, and sixth respondent one set, will pay and receive proportionate costs according to their relative success or failure.

V.K. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE M. NATESAN.

P. Sirajuddin .. *Petitioner**

v.

Government of Madras, represented by the Chief Secretary, Fort St. George, Madras-9, and others .. *Respondents.*

Criminal Procedure Code (V of 1898), sections 162 and 163 and 251-A (2) and Prevention of Corruption Act (II of 1947), sections 5 and 8—Scope and effect—Prosecution under the later Act on the basis of information obtained in disregard of the express provisions of the Code of Criminal Procedure—Legality.

Prevention of Corruption Act (II of 1947), section 5 (1) (b) and (d)—Scope of—Receipt of illegal gratification from subordinate officers—If an offence under section 5 (1) (b) of the Act.

Prevention of Corruption Act (II of 1947), section 8—Scope of—Immunity from prosecution—Statements obtained by inducement of such an immunity—Validity of.

The object of sections 161 and 162 of the Code of Criminal Procedure and the prohibition laid therein is to protect the accused persons from being prejudiced by statements made to Police Officers. While the intention of the Legislature is on the one hand to encourage free disclosure of information, the accused should be protected both against over-zealous Police Officers and untruthful witnesses. Courts have always regarded any breach of the provisions of section 162 as a matter of gravity. Violation of the mandatory provisions of sections 162 and 163 of the Code will not only impair the evidentiary value of statements recorded in contravention of the provisions but will also impair the evidence given on oath based on such statements, even though such evidence may be judicially recorded under section 164 of the Code. Irregularities and illegalities during an investigation may not necessarily vitiate the entire proceedings but may only affect the value of the evidence. But statements recorded during an investigation, if they violate the mandatory safeguards provided under sections 161 and 162 of the Code stand on a different footing. They cannot be considered at the stage of framing charge under section 251-A of the Code.

The question as to when an investigation can be said to have commenced is a question of fact to be decided on the facts and circumstances of each case. While every inquiry started on vague information may not be an investigation so as attract the safeguards provided under sections 161 and 162 of the Code, any statement recorded, subsequent to the receipt of definite information of the commission of an offence in gathering evidence of the offence would be a statement recorded during investigation and will attract the provisions of section 162 of the Code.

The mere fact that the Police Officer has not recorded the first information report cannot affect the question whether the investigation has in fact commenced. An investigation within the meaning of the section should certainly be deemed to have commenced when the Police Officer acts on receipt of definite information and he cannot by merely delaying the recording of the first information report, deprive the accused of the safeguards provided under the section.

(Procedure for recording of first information report and investigation analysed—Provision of the Code explained—Case-law discussed.)

Statements recorded by inducement of assurances of immunity from prosecution to accomplices under section 8 of the Prevention of Corruption Act will be in violation of the provisions of section 162 of the Code and would vitiate the investigation.

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* W.P. Nos. 390 and 391 of 1965, C.R.C. No. 294 of 1965 and Cr. Mis. P. No. 934 of 1965. 13th April, 1966.

Having regard to the object and scope of section 251-A of the Code, a Court cannot ignore the irregularities and illegalities in the matter of investigation brought to its notice before the framing of the charge and the accused cannot be made to stand trial on charges made on materials gathered in violation of the provisions of the Code.

[Case sent back with observations to consider the material afresh before framing charge].

The language of section 5 (1) (*b*) of the Prevention of Corruption Act is identical with the language of section 165 of the Penal Code and it would be applicable only to cases of receipt of valuable things by public servants from third parties who are not subordinates of the accused. It is difficult to include the subordinate of an officer as persons concerned in any business transacted or to be transacted by him. Where an officer is charged as having received valuable things from his subordinates for no consideration or inadequate consideration the officer may be punishable under section 5 (1) (*d*) of the Act and not under section 5 (1) (*b*) which would apply only to acceptance of illegal gratification from third parties.

Section 8 of the Prevention of Corruption Act (II of 1947) no doubt gives a statutory immunity, outside judicial pardon, to bribe-givers. But it is doubtful whether persons guilty of an offence could escape prosecution because of the assurances given under this section. The grant of pardon is a judicial function and assurances or guarantees given by the Government or the Police Authorities cannot be recognised as immunity from prosecution. The amnesty granted by section 8 of the Prevention of Corruption Act seems to emanate from the Government and is of the widest character. However for such an amnesty, outside judicial pardon is valid is a moot question. But it is certainly not safe to receive or rely upon statements made under such inducements, by accomplices in a prosecution of the accused.

Petitions praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue writs of *mandamus* directing the second respondent, Director of Vigilance and Anti-Corruption, Government of Madras, Madras-6, to forbear from prosecuting the petitioner in Calender Case No. 10 of 1964, on the file of the Special Judge, Madras division (third respondent) and *certiorari* calling for the records in Criminal Miscellaneous Petition No. 86 of 1964, in Calender Case No. 10 of 1964 and the connected records on the file of the Special Judge, Madras division and to quash the order dated 16th January, 1965.

Petitions under sections 435 and 439 and 561-A of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Special Judge, Madras division, dated 16th January, 1965, in Criminal Miscellaneous Petition No. 86 of 1964 in Calender Case No. 10 of 1964 and quash the order of the Special Judge, Madras division, dated 16th January, 1965, in Criminal Miscellaneous Petition No. 86 of 1964, in Calender Case No. 10 of 1964, directing the framing of Charges against the petitioner under section 5 (2) read with section 5 (1) (*d*) of the Prevention of Corruption Act, 1947, and discharge the petitioner under section 251 (A) (2), Criminal Procedure Code.

V. K. Thiruvenkatachari and *V. T. Rangaswami Iyengar* for *G. Ramaswamy* and *S. M. Amjad Naindr*, for Petitioner.

Advocate-General (*N. Krishnaswami Reddy*) for Additional Government Pleader (*V. Ramaswami*) and Public Prosecutor (*V. P. Raman*), for Respondents.

The Order of the Court was pronounced by

Natesan, J.—These cases arise out of a charge-sheet laid before the Special Judge, Madras division, by the Directorate of Vigilance and Anti-Corruption, Madras on 5th October, 1964 against P. Sirajuddin, Retired Chief Engineer, Highways and Rural Works, Madras, under section 165, Indian Penal Code and section

5 (2) read with section 5 (1) (*b*) and (*d*) of the Prevention of Corruption Act, (II of 1947) and taken on file as Calendar Case No. 10 of 1964 by the Special Judge. The petitioner is charged, to be brief, with having habitually obtained for himself and members of his family valuable things from his subordinate officers without consideration or for inadequate consideration or securing pecuniary advantage by corrupt or illegal means or by abusing his position as public servant. Nineteen instances are enumerated in the charge-sheet between the period 3rd January, 1961, and 14th March, 1964. He is alleged, for instance, to have directed another officer working under him to get a suit length of imported variety of cloth and for its cost of Rs. 390 paid Rs. 200 only and asked the Subordinate Officer to make good the balance by adjustment in the departmental nominal muster rolls. Similarly he had a new Rolex Oyster date wrist watch from his subordinate without paying for it, the cost to be taken by manipulation of the nominal muster rolls. He got amenities like white-washing and F.O.L. done to his house by his subordinates. For our present purpose it is needless to detail the charges.

Before the matter was taken up by the Special Judge for consideration, an application, Criminal Miscellaneous Petition No. 86 of 1964, was filed by the petitioner praying that he may be discharged under section 251-A, Criminal Procedure Code. On this application, the learned Special Judge, while holding that there was no basis or material for charging the petitioner under section 165, Indian Penal Code or under section 5 (2) read with section 5 (1) (*b*) of the Prevention of Corruption Act, held that a charge could be framed against the accused under section 5 (2) read with section 5 (1) (*d*) of the Prevention of Corruption Act. Against the said order, dated 16th January, 1965, the Public Prosecutor has preferred Criminal Revisional Case No. 294 of 1965, under sections 435 and 439, Criminal Procedure Code. The petitioner has preferred Criminal Miscellaneous Petition No. 934 of 1965, under section 561-A, Criminal Procedure Code for quashing the proceedings and discharge the petitioner, as the charge against him was groundless. Writ Petition No. 391 of 1965, is for the issue of a writ of *certiorari* or other appropriate writ or direction under Article 226 of the Constitution for quashing the order in Criminal Miscellaneous Petition No. 86 of 1964, directing the framing of the charge under section 5 (2) read with section 5 (1) (*d*) of Act II of 1947. Writ Petition No. 390 of 1965, relating to the same proceedings is for the issue of a writ of *mandamus* or other appropriate direction or order directing the Director of Vigilance and Anti-Corruption, to forbear from prosecuting Calender Case No. 10 of 1964. The writ petitions are sought to be maintained as providing the only effective remedy in the circumstances alleged. It is submitted that this is one of those cases where there has been such a violent departure from the provisions of the Criminal Procedure Code in the matter of investigation and cognizance of offences as to amount to denial of justice and call for interference by the issue of prorogative writs. In the several affidavits filed averments are made that the investigation and prosecution are wholly *mala fide* and groundless and have been set afoot by the Officer immediately next in rank to the petitioner, Sivasankara Mudaliar, Superintending Engineer, Madras. It is alleged that the petitioner was to retire on the 14th of March, 1964 and in the normal course he would have been retained till he completed the age of 58 years, that the circumstances and sequence of events revealed that the aforesaid gentleman had used his influence with the Chief Minister of the State to get the petitioner retired, and that not content with it he is harrassing him further. It is stated that the petitioner during the course of his official duties had to find fault with this gentlemen, and that he had nurtured grievance against the petitioner on account. Several serious irregularities during the investigation are listed and it is contended that from the records it will be clear that the petitioner is being specifically singled out and discriminated against. The two writ petitions, criminal revision case and criminal miscellaneous petition were all heard together and no objection as to the maintainability of the writ petitions was taken before us by the learned Advocate General appearing for the prosecution.

In the affidavit in support of his petition for the issue of a writ of *mandamus*, the petitioner avers that from the copy of the statements furnished under section 173 (4), Criminal Procedure Code, he found that 18 public servants have stated that they have given him valuables for no or inadequate consideration, and that at his instance for the purpose of reimbursing themselves they had deliberately committed offences of criminal conspiracy under section 120-B, Indian Penal Code, criminal breach of trust of Government money under section 409, Indian Penal Code, falsification of accounts under section 477-A, Indian Penal Code, forgery of public records under section 466, Indian Penal Code, and also offences under section 5 (1) (*c*) and section 5 (1) (*d*) read with section 5 (2) of Act II of 1947. The petitioner states that the charges against him depend upon the statements of these subordinate officers in service and in their statements they admit their reimbursing themselves by manipulating departmental accounts. The petitioner charges the Director of Vigilance and Anti-Corruption with obtaining signed statements which are confessional and self-incriminating from the witnesses giving them assurance of immunity. The assurances are in common form and the operative portion runs thus :

"This is to affirm on behalf of the Government of Madras, and its officers, that in respect of any criminal or departmental offence disclosed in any true but inculpatory statement made by any official or non-official relating to enquiries into allegations of corruption against a certain public servant, no criminal prosecution will be launched by the police or by any other Government agencies and no other departmental action likely adversely to affect the deponent will be launched against any official or non-official making such true statements to facts within his or her personal knowledge."

In the principal affidavit in Writ Petition No. 390 of 1965, it was categorically stated that the petitioner had every reason to believe that assurances in this form have been given to the 18 public servants from whom statements have been recorded at the investigation. Charging that the procedure that has been adoped is in the circumstances a deliberate violation by devious means of the provisions of the Criminal Procedure Code relating to confessions and pardons to secure a definite end, it is submitted that the inves tigation is wholly illegal. Complaining that the procedure is a device for manufacturing a case against the petitioner at the instigation of higher authorities, it is stated that here is a clear case of discrimination by the State and the police leaving out other persons who are guilty on their own statements and prosecuting the petitioner only. The malice and *mala fides*, it is stated are apparent. More it is pointed out that by securing sanction to prosecute the petitioner when no sanction is necessary, the petitioner being a retired Government servant when the charge-sheet was filed, an air of reality and solemnity is designedly sought to be given to the proceeding.

A part from the question of *mala fides* and discrimination, the principal question that has arisen for consideration is whether there has been any violation of sections 162 and 163 of the Code of Criminal Procedure and the effect of the violations if any. For the petitioner it is submitted that the signed statements for which assurances had been given to the witnesses are statements taken after investigation commenced and it is a fraud on procedure to rely on subsequent unsigned statements as statements under section 161 (3), Criminal Procedure Code for the purpose of section 173, Criminal Procedure Code. As the section 161 statements are the material on which the Special Judge has to consider whether the charge is groundless under section 251-A (2), Criminal Procedure Code, it is submitted that the illegality corroding the foundation vitiates the enquiry and necessitates discharge of the petitioner.

The history of the investigation as set out in the counter-affidavit in Writ Petition No. 390 of 1965, dated 12th December, 1965, by R. Thirumalai, the Secretary to the Government, Public Works Department, may be briefly set out. It is stated that prior to the date of the retirement of the petitioner, the Government had

definite information about the corrupt activities of the petitioner and in the beginning of March, 1964, the Government caused confidential enquiry to be made through the Director of Vigilance and Anti-Corruption, Madras, the second respondent in the writ petitions. The decision to retire the petitioner on 14th March, 1964, without giving him re-employment was taken by the Government on the record of service of the petitioner. It is not disputed that the decision to retire him was communicated to him only at 2 P.M. on 14th March, 1964 with direction to hand over charge to Sivasankara Mudaliar about whom reference has already been made. In the counter-affidavit for the State it is pointed out that 23 public servants have given statements and that only five of them stated that they had given valuable things to the petitioner for no or inadequate consideration. The counter-affidavit admits manipulations in the nominal muster rolls by S. Sivasubramaniam, an assistant engineer and S. Chidambaram, a junior engineer, for recouping the mselves with assistance from other named subordinates. The stand is taken for the State that the manipulations at the instance of the petitioner and the acts of petitioner are distinct and separate things and the charge-sheet is concerned only with the misconduct of the petitioner. It is stated that the irregularities of the subordinates are incidental and subsidiary and so they have been taken as witnesses. Their acts are only at the instance of the petitioner who was then the head of the department. As regards assurances of immunity, it is acknowledged in specific terms that the witnesses were given assurance certificates by the Deputy Superintendent of Police who conducted the preliminary enquiry. It is stated that the certificates were given after they had given their statements. Reliance is placed on section 8 of the Prevention of Corruption Act, 1947, which gives protection to a bribe giver from prosecution under section 165-A, Indian Penal Code. It is set out that the registration of the case against the petitioner with the Directorate of Vigilance and Anti-Corruption or the first information report was only on 27th June, 1964 and the charge-sheet was filed with the Special Judge on 5th October, 1964. In the reply affidavit filed by the petitioner to this counter it is pointed out that the only manner in which any person who is suspected to be an offender or abettor could be taken as witness to depose against another is to tender him pardon according to law. The purported exercise of discretion by the vigilance department citing all the other persons as witnesses, it is stated, is in flagrant violation of the provisions of the Criminal Procedure Code and a clear case of hostile discrimination. It is submitted that the mode in which the investigation had gone on and sanction given show a pre-determination by the Government. It is emphasised that at the time when the matter was before the Special Judge, the factum of immunity having been granted was not disclosed. The petitioner submitted that the evidence that has been procured at the investigation was clearly on threat, inducement and assurance of protection not usually granted, and that on the sole ground that the investigation and collection of evidence has proceeded in utter disregard of law, the entire proceedings have to be quashed. It has, in the circumstances, become necessary to examine in detail as to when the investigation under the Code can be said to have commenced in the present case and the nature and character of the several statements stated to have been taken during the investigation.

By Civil Miscellaneous Petition No. 589 of 1966, in Writ Petition No. 390 of 1965, the petitioner sought production of a petition alleged to have been received by the Deputy Superintendent of Police, Vigilance and Anti-Corruption, on 15th April, 1964, the statements recorded by him in pursuance of the said petition and copies of the assurance certificates given to the witnesses. Production was also sought from the Chief Secretary to the Government of Madras of the note file relating to his retirement, G.O. Ms. No. 674, Public Works Department, dated 14th March, 1964. In the counter-affidavit to this by the Director of Vigilance and Anti-Corruption, dated 26th February, 1966, it is stated that there is no objection to the production of the statements recorded by the Deputy Superintendent of Police, Vigilance and Anti-Corruption, in the preliminary enquiry conducted by him and the copies of the assurance certificates given by him to Sivasubramaniam, assistant engineer,

and Chidambaram, junior engineer. It is averred that no petition was received before the commencement of the preliminary enquiry and the preliminary enquiry was commenced on a note sent by the Director of Vigilance to the Deputy Superintendent of Police on 15th April, 1964. The Deputy Superintendent of Police, Vigilance and Anti-Corruption, G. K. Ranganathan, has filed a supplemental counter-affidavit on 24th February, 1966. This states that he conducted the enquiry in the matter pursuant to the orders, dated 15th April, 1964 of the Director of Vigilance registering the enquiry as 8/HD/64. He affirms in his affidavit that he gave assurance certificates in the common form referred to by the petitioner only to Sivasubramaniam and Chidambaram and none else. It is denied that assurance certificates have been given to eighteen public servants. He states that during his enquiry he took statements only from nine witnesses, two of them being Sivasubramaniam and Chidambaram above referred to. He states that he conducted the detailed enquiry only on the basis of the note on which enquiry No. 8/HD/64 was started on 15th April, 1964, and not on any petition. On the prayer for production of the note file relating to G.O.Ms. No. 674, Public Works Department, the Secretary to the Government, Public Works Department, as head of the department, claimed privilege stating that the file is an unpublished office record relating to the affairs of the State and its disclosure will cause injury to the public interest. It was stated that disclosure of this document would impair the proper functioning of public service and efficient administration of public affairs. However, the relevant file was produced in Court by the learned Advocate-General for our perusal and there was no objection to learned Counsel for the petitioner having inspection of the papers in the file excepting as regards the notes and minutes made by the officers and opinions expressed.

From the supplemental counter-affidavit filed on behalf of the respondents in Writ Petition No.390 of 1965 it is seen that a copy of a petition, dated 28th February, 1964, addressed to the Minister of Public Works purporting to emanate from one Rangaswamy Nattar, North East Street, Thillai Nagar, Trichy, was received by the Chief Minister on 1st March, 1964. This was marked by the Chief Minister to the concerned department, as it contained allegations of corruption against the petitioner. It is stated in the supplemental counter-affidavit that similar allegations had come to the notice of the Government, and that as the question of granting an extension of service to the petitioner who was due to retire on 15th March, 1964, was pending consideration, the Director of Vigilance and Anti-Corruption was requested by the Chief Minister to make confidential enquiry and give opinion to the Government. It is now seen from the supplemental affidavit that the Director, Vigilance and Anti-Corruption, sent a note on the matter on 10th March, 1964. There was a vagueness in the original counter-affidavit filed as to when the Government got definite information about the corrupt activities of the petitioner. In fact it read as if they had definite information even before the Government directed the enquiry by the second respondent. In the present supplemental affidavit it is stated that the Government had definite information relating to the corrupt activities of the petitioner from the note, dated 10th March, 1964. It is unnecessary to discuss in detail this aspect of the matter, as the same has greater relevancy and bearing on the question whether the services of the petitioner were not continued beyond his fifty-fifth year *mala fide*. We are at the moment not on that matter. In the affidavit of the Secretary to Government, Public Works Department, R. Thirumalai, it is now made out that further and detailed enquiry was directed by the Chief Secretary to the Government on the basis of the note, dated 10th March, 1964 and on this the Director of Vigilance registered the enquiry No. 8/HD/64. Copies of the petition, dated 28th February, 1964, and the note, dated 10th March, 1964, have now been given to the petitioner. The Secretary to the Government, Public Works Department, who had earlier not denied the averments in the affidavit of the petitioner of the grant of assurance certificates to eighteen persons, now states that on enquiry he understands that assurance certificates have been given only to two officers. He also stated that by inadvertence it was not specifically averred

that assurance certificates were given only to the two officers and none else. We cannot pass by these averments without remarking that the explanation now submitted is puerile. Courts expect exactitude from officers of Government on such matters. The question raised by the petitioner is of vital importance to him. He has pleaded that the eighteen witnesses whose statements are relied upon for charging him with serious offences have been given assurance of total immunity. This procedure in the investigation has been attacked as undermining the very foundation of criminal justice as administered in this country. The petitioner would have it that the statements of these witnesses in whatever form they may be presented at the enquiry under section 251-A, Criminal Procedure Code, would have to be wholly discarded and the argument is that if these statements are out of the record, there will not be a tittle of material for framing charges against the petitioner. When the petitioner has come to this Court with that case, there is no repudiation in the earliest counter-affidavit filed in the matter denying that the assurance certificates have been granted to all these eighteen witnesses. The statements of these eighteen witnesses are *ex facie* valuable material for the prosecution. It is only after the writ petitions had been taken up for arguments, at a crucial stage of the hearing, that supplemental affidavits are forth-coming limiting the grant of assurance to two of the chief witnesses. The Secretary to Government, Public Works Department now states on oath that on enquiry from the concerned officer he understands that only two assurance certificates have been given and that he is not personally aware of these facts relating to the granting of assurance certificates. The petitioner who has expressed apprehensions of *mala fides* and ulterior motives in the prosecution may justifiably have the feeling that but for the supplemental affidavits he has a very good case. Naturally in his reply affidavit the petitioner states that the averment now that only two witnesses were given assurance certificates is an after thought and incorrect and the State should not be allowed to go back on its original counter-affidavit by a very responsible officer of the rank of the Secretary to the Government.

From the records now before us it is seen that a detailed enquiry was started on 15th April, 1964. But according to the prosecution the investigation commenced only on 27th June, 1964, on a complaint given by G. K. Ranganathan, Deputy Superintendent of Police, Vigilance and Anti-Corruption, Madras, to the Additional Superintendent of Police, Vigilance and Anti-Corruption. It is seen from the record that it is on 27th June, 1964, the first information report was submitted to the Principal Sessions Judge, Madras, the Special Judge. Sanction to prosecute was obtained on the 29th of September, 1964, in G.O. No. 3107 and the charge-sheet was filed before the Special Judge on the 5th of October, 1964. It is submitted for the State that from 27th June, 1964, 47 witnesses have been examined in the investigation that followed and that only nine of these witnesses had been previously examined at what is termed a preliminary or detailed enquiry. It is the case now that from these nine witnesses only signed statements have been taken. A statement purported to have been recorded from Sivasubramaniam on 27th June, 1964 is relied upon as his section 161, Criminal Procedure Code statement. But on 9th June, 1964 a signed statement has been taken from him and on 22nd July, 1964, a statement has been taken from him under section 164, Criminal Procedure Code. Similarly from Chidambaram a signed statement was taken on 3rd June, 1964. A statement purported to have been recorded from him on 27th June, 1964, is relied upon as his section 161, Criminal Procedure Code statement. A statement under section 164, Criminal Procedure Code has been recorded from him on 23rd July, 1964. Assurance certificates are admitted to have been given to these two witnesses when the first signed statements were recorded from them.

We do not think it necessary to go into greater details of the facts or the actual merits of the accusation. It is always embarrassing to a superior Court to deal with a matter still at the stage of enquiry and determination in the Court of first instance and particularly in a criminal matter where on the one hand the liberty and reputation of the petitioner are at stake and on the other the interest of the public at large

that crime and unsocial acts which are offences under the law should be put down with firm hand. We may, however, state that we are not impressed with the contention that the proceeding should be quashed for the reason that it is the result of *mala fides*, or that a direction should now be given by the Court for the prosecution of the subordinate officers also.

As stated earlier we are not concerned in this case with the question whether the petitioner might have been continued in service. The inference which the petitioner draws as he states from the subsequent events of the use of influence by his deputy, Sivasankara Mudaliar, with the Chief Minister, finds specific repudiation in the affidavit of the Chief Minister. The Chief Minister in an affidavit filed very early in the proceedings has denied that Sivasankara Mudaliar is related to him and that Sivasankara Mudaliar used any influence with him for promotion as Chief Engineer. We have no reason whatever not to accept the Chief Minister's statement. Charge of communal or sub-communal bias is sought to be made out in the affidavits of the petitioner. In our view, this charge is equally groundless. Such a charge is easily made and can come in handy when there is nothing else to hang upon. Besides, these considerations are totally irrelevant if in fact the petitioner is guilty of the offence with which he is charged and could be so found on relevant, legal and material evidence. Motive or malice in prosecution cannot absolve a criminal; may be if established it may have its effect in appreciation of the evidence for the prosecution.

The charge of hostile discrimination coming under Article 14 of the Constitution is equally groundless. May be that several of the witnesses who have been examined and from some of whom signed statements have been taken by the police are equally blameworthy and are accomplices. It is felt by the prosecution that if they arraign the subordinate officers also along with the petitioner, the whole case may fail for lack of evidence. What weight would be given by the Court to the evidence of the accomplices is quite a different matter. It is well understood that evidence of accomplices is tolerated as a necessity as it may be impossible to get sufficient evidence of many crimes unless some of the participants or at least one of them is disposed to disclose the circumstances within his knowledge. Usually pardon is tendered and an accomplice is taken as approver. As noticed in Sarkar's Evidence, eleventh edition, at page 1200:

> "The State may enter *nolle prosequi* against an accused and call him as a prosecution witness, or the police may refrain from prosecuting a person with a view to call him as a witness against his confederates in the offence."

Under section 494, Criminal Procedure Code any Public Prosecutor may with the consent of Court withdraw from the prosecution of any person. Where interests of justice may require that every offender should be booked, equally interests of justice may require that where it is not possible, some at least are arraigned and the rest retained for giving evidence at the trial. The policy of not securing judicial pardon to accomplices and bringing them as approvers but retaining them at the sole discretion of the prosecution may be open to question, but that cannot be itself invalidate the arraignment of the persons actually put up for trial. If it is laid down that all participants in a crime should be put up for trial, grave consequences may ensue. Abbott, L.C.J. observed in his charge to the Grand Jury in March, 1820 in *Trial of Arthur Thistlewood for High Treason*[1] that

> "............it must not only happen that many heinous crimes and offences will pass unpunished, but great encouragement will be given to bad men, by withdrawing from their minds the fear of detection and punishment through the instrumentality of their partners in guilt, and thereby universal confidence will be substituted for that distrust of each other, which naturally possesses men engaged in wicked purposes, and which operate as one of the most effectual

1. (1820) 33 How. St. Tr. 682, 689.

restraints against the commission of those crimes, to which the concurrence of several persons is required."

The demoralising effect of a general absolution by the prosecution authorities to practically all accomplices on the administration is one thing, whether there is hostile discrimination against the person actually prosecuted is quite a different thing. It cannot be said that the superior officer and the subordinates are similarly situated. The subordinate may feel that he should oblige his superior or otherwise incur his displeasure, and he could hardly run that risk. For the present we are not concerned with the merits of the case. That is a question which will fall for consideration if and when it becomes necessary for the accused to be tried for the offence. The accused may be perfectly blameless. But the question is if in fact the investigation reveals that there is a *prima facie* case against him, it could be said that the prosecution of the chief alone is the result of *an evil eye and unequal hand* It is alleged for the petitioner that his immediate deputy, Sivasankara Mudaliar, having achieved his object and got the petitioner retired and showing his spite further by getting all the staff in the Highways department under his control and setting up the subordinates against him. Assuming that Sivasankara Mudaliar bears illwill and malice against the petitioner, we are not pronouncing upon it, that cannot in the least affect the validity of the investigation and prosecution if it is otherwise regular. It may affect the credibility of the witnesses who happen to be subordinates of Sivasankara Mudaliar. That is a matter for consideration in the appreciation of evidence by the trial Judge, and much will depend upon the confidence in their testimony which the witnesses inspire. But certainly it cannot be said that there is any objectionable discrimination in proceeding with the prosecution of the principal offender leaving out the subordinates. In this particular case they continue to be in service and subject to the disciplinary jurisdiction in the service.

Really the important question that is posed for consideration is the effect of the alleged contravention in the proceedings of sections 162 and 163, Criminal Procedure Code. The argument of the learned Counsel for the petitioner, Mr. V.K. Thiruvenkatachari, on this part of the case may be briefly summed up thus: Under section 251-A, Criminal Procedure Code which is the procedure to be adopted by the Special Judge in this case, whether or not a charge has to be framed against the petitioner has to be decided by the Special Judge upon a consideration of all the documents referred to in section 173 and on such examination of the petitioner as the Special Judge may think it necessary and on hearing Counsel for the prosecution and the petitioner. The documents referred to in section 173 are those specified in section 173 sub-clause 4 and include the statements, if any, recorded under section 164, Criminal Procedure Code, and the statements recorded under sub-section (3) of section 161 of all the persons whom the prosecution proposes to examine as its witnesses. Learned Counsel submits that if there is any violation of sections 162 and 163, the documents cease to be those whose consideration is provided under section 251-A, Criminal Procedure Code. If these documents are excluded, learned Counsel submits, there will be no material on which a charge could be framed against the petitioner in this case. The learned Special Judge would have to conclude that the charge against the petitioner is groundless and discharge him. For the prosecution it is submitted that the signed statements and assurances were all prior to the commencement of the investigation and they were not statements recorded under section 161, Criminal Procedure Code. The prosecution would have it that the investigation commenced on the filing of the first information report on 27th June, 1964 and not before.

It will be convenient to set out sections 161 to 163, Criminal Procedure Code.

"161. (1) Any Police Officer making an investigation under this chapter or any Police Officer not below such rank as the State Government may by general or special order, prescribe in this behalf acting on the requisition of such officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer all questions relating to such case put to him by such officer other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The Police Officer may reduce into writing any statement made to him in the course of an examination under this section, and if he does so he shall make a separate record of the statement of each such person whose statement he records.

162. (1) No statement made by any person to a police officer in the course of an investigation under this chapter, shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (same as hereinafter provided) of any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such enquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution to contradict such witness in the manner prescribed by section 145 of the Indian Evidence Act (I of 1872) and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of section 32, clause (1) of the Indian Evidence Act (I of 1872), or to affect the provisions of section 27 of that Act.

163. (1) No police officer or other person in authority shall offer or make or cause to be offered or made, any such inducement, threat or promise as is mentioned in the Indian Evidence Act, 1872, section 24.

(2) But no police officer or other persons shall prevent, by any caution or otherwise, any person from making in the course of any investigation under this chapter any statement which he may be disposed to make of his own free will.

One thing is clear that it is to statements recorded during investigation under Chapter XIV that sections 162 and 163 apply. Learned Counsel have taken us through these relevant provisions in Chapter XIV, Part V of the Code, headed, information to the police and their powers to investigate. The first question for consideration is when the investigation commenced in this case. Ultimately, this is a question of fact and often defies easy determination. In cases like habitual bribery and corruption it may often be necessary to make preliminary and informal enquiries as to whether at all there is anything in the news floating about corruption and bribery as to necessitate a formal investigation. There may be groundless charges inspired by pure malice, anonymous and pseudonymous letters by disgruntled persons, may be, chagrined by the integrity of the officer and a formal investigation may damage the reputation of persons holding responsible posts. The other aspect is that in certain types of cases it may help delinquents to cover their tracks and vanish drying all sources of information. But it could be said that while an enquiry may start with shadowy beginnings and vague rumours, once a police officer forms a definite opinion that there are grounds for investigating a crime, an investigation under the Code has started. Anything said or done subsequently must be held to have been done or said during the investigation. As pointed out in *H. N. Rishbud and Inder Singh* v. *The State of Delhi*[1]:

"Investigation usually starts on information relating to the commission of an offence given to an officer-in-charge of a police station and recorded under section 154 of the Code. If from information so received or otherwise, the officer-in-charge of the police station has reason to suspect the commission of an offence,

1. (1955) 1 S.C.R. 1150, 1156 : (1955) S.C.J. 283 : (1955) 1 M.L.J. (S.C.) 173.

> he or some other subordinate officer deputed by him, has to proceed to the spot to investigate the facts and circumstances of the case and if necessary to take measures for the discovery and arrest of the offender. Thus investigation primarily consists in the ascertainment of the facts and circumstances of the case. By definition it includes " all the proceedings under the Code for the collection of evidence conducted by a police officer." For the above purposes, the investigating officer is given the power to require before himself the attendance of any person appearing to be acquainted with the circumstances of the case. He has also the authority to examine such person orally either by himself or by a duly authorised deputy"

Section 154 of the Code provides for the recording of every information relating to the commission of a cognizable offence if given to an officer-in-charge of a police station. Under section 156 any officer-in-charge of a police station may without the order of a Magistrate investigate any cognizable case which a Court having jurisidiction over the local area would have power to enquire into or try under the provisions of Chapter XV relating to the place of enquiry or trial. Under section 157 of the Code a police officer-in-charge of a police station has, if from information received or otherwise reason to suspect the commission of an offence to forthwith send a report of the information to a Magistrate empowered to take cognizance of such offence and commence investigation of the facts and circumstances of the case. Reference may be made in this connection to section 551 of the Code which provides that police officers superior in rank than officer-in-charge of a police station may exercise the same powers throughout the local area to which they are appointed as may be exercised by such officer within the limits of his station. It is not questioned in this case for the petitioner or the prosecution that the police officer who conducted enquiries prior to the formal first information report lodged on 27th June, 1964, was not a person competent to enter upon investigation. To recapitulate the progress of the enquiry, even admittedly there has been an earlier probe by the vigilance department prior to 10th March, 1964. They had submitted a report on 10th March, 1964 on which the Government had acted and retired the petitioner without giving him re-employment. It is admitted that this report, dated 10th March, 1964 was the definite information to the Government relating to certain corrupt activities of the petitioner. It is found in the counter-affidavit now filed for the prosecution that on the orders of the then Chief Secretary to Government to conduct further and more detailed enquiry into the allegations revealed by the note, dated 10th March, 1964, the Director of Vigilance and Anti-Corruption registered enquiry 8/HD/64 on 15th April, 1964. G. K. Ranganathan, Deputy Superintendent of Police, Vigilance and Anti-Corruption, Madras City, admittedly conducted an enquiry in the matter pursuant to the registration of the enquiry on 15th April, 1964. He would state in his present affidavit that he had taken statements from nine witnesses during the enquiry conducted by him till the filing of what is relied on by the prosecution as the first information report on 27th June, 1964. He would have it that assurance certificates were given to two out of these nine witnesses all of whom have signed their statements. On behalf of the petitioner the present version as to the number of the witnesses examined before 27th June, 1964, and the number of persons to whom assurance certificates have been granted is questioned. It is needless for us to decide at this stage which of the proposed witnesses for the prosecution were examined prior to 27th June, 1964, also which of them have given signed statements and which among them were given assurance of immunity purporting to be on behalf of the State. While it can be stated as a general principle that not every piece of information, however vague, intangible and indefinite need be recorded as first information report under section 154, Criminal Procedure Code, to start an investigation, it is equally clear that to permit a preliminary enquiry before recording the first information even after definite information as to the commission of an offence is received would be to destroy the value of the first information report and equally to provide room for fabrication of cases. If the first information could be recorded after a detailed enquiry into the offence is conducted, there is the danger and temptation to incorporate in the first information report details

and circumstances advantageous to the prosecution. Section 154 only provides for the receipt of information relating to the commission of a cognizable offence ; that is, the information should be such that it enables the police to come to the conclusion that a cognizable offence has been committed. On receipt of such information the section provides for its being reduced to writing and authenticated by the person giving it. The substance of it has to be entered in a book to be kept by the officer-in-charge of the police station in such form as the State Government may prescribe in this behalf. Section 157 provides for the sending of the report of information to the Magistrate empowered to take cognizance of an offence, if from information received or otherwise an officer-in-charge of a police station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate. It is unnecessary to refer to several other features of the provisions of sections 154 to 157, Criminal Procedure Code. Under section 158 every report sent to a Magistrate under section 157 shall, if the State Government so directs, be submitted through such superior officer of police as the State Government, by general or special order, appoints in that behalf and such superior officer may give such instructions to the officer-in-charge of the police station as he thinks fit, and shall after recording such instructions on such report transmit the same without delay to the Magistrate. Section 157, it is seen casts an imperative duty on a police officer who has reason to suspect, be it from information received or otherwise, that a cognizable offence has been committed, to report forthwith the matter to the Magistrate and initiate investigation. The aforesaid provisions of the Code relating to registration and investigation of an offence do govern also an offence under the Prevention of Corruption Act. Can a police officer by merely delaying sending a report to the Magistrate after the receipt of definite information of the commission of an offence proceed upon what he would regard as more detailed enquiry and deprive the petitioner of the safeguards provided under section 162, Criminal Procedure Code, in respect of the statements recorded during that enquiry? In our view, it would be a travesty of justice if the provisions intended with the definite object of safeguarding the accused could be evaded in that manner. The delay on the part of the investigating officer in registering the first information report may be an irregularity; but certainly the statement recorded subsequent to the receipt of definite information of the commission of an offence in gathering evidence of the offence would nonetheless be a statement recorded during investigation and hit by section 162, Criminal Procedure Code.

Investigation is defined by section 4 (1) of the Code as to include all the proceedings under the Code for the collection of evidence conducted by a police officer or by any person other than a Magistrate who is authorised by a Magistrate in this behalf. In the so-called complaint, dated 27th June, 1964 filed by G. K. Ranganathan, Deputy Superintendent of Police, Vigilance and Anti-Corruption, it is stated that on the orders of the Government a full-fledged enquiry was conducted into the allegations of corruption, misconduct and malpractices against the accused, and that as a result of the enquiry conducted by him the instances of obtaining valuable things by corrupt or illegal or by otherwise abusing his position as public servant set out in the complaint have come to light. After setting out the instances, it is stated that from the same it would be seen that from 2nd January, 1961 to 14th March, 1964, the petitioner habitually obtained from his own subordinates valuable things without consideration or for consideration which he knew to be inadequate and by corrupt and illegal means, abusing his position as a public servant, obtained for himself many valuable things, thereby committing offences punishable under sections 161 and 165, Indian Penal Code and section 5 (1) (*a*) and (*d*) read with section 5 (2) of the Prevention of Corruption Act, 1947. Registration of a criminal case against the petitioner under the aforesaid sections is prayed for, as a regular investigation alone would *facilitate the collection of additional evidence by way of recovering the various valuable things which he obtained from his subordinates*, etc., by illegal means. It is stated that in addition more incriminating evidence is likely to be forthcoming during a regular investigation. It is after this no doubt there was search of the

premises of the petitioner on 29th June, 1964 for the gathering of additional evidence by way of recovery of valuable things alleged to have been obtained by the petitioner. This complaint admits that some evidence had already been gathered. What is wanted is further evidence, particularly search of the premises of the petitioner. There is a clear admission of a prior full-fledged enquiry. This was after the registration of the offence by the Director of Vigilance and Anti-Corruption on 15th April, 1964. In this first information report, dated 27th June, 1964, no doubt the Additional Superintendent of Police, Vigilance and Anti-Corruption, Madras, R. N. Krishnaswami, would state that he is personally investigating the case. Since this has been sent to the Special Judge, as first information report the prosecution has taken this as the starting point for investigation. As already stated, it would be a travesty of justice to treat the investigation as commencing from 27th June, 1964. We are unable to appreciate any emphasis on the lodging of the complaint by the Deputy Superintendent of Police, Vigilance and Anti-Corruption to the Additional Superintendent of Police, Vigilance Anti-Corruption—between tweedledum and tweedledee. Substantial information and evidence it is found, has been gathered before the so-called first information report was registered. The fact of registration of the first information report long after steps were taken to gather evidence, cannot affect the question as to when the investigation started. Collection of evidence relating to the commission of an offence is one of the definite steps in the investigation of a case, and here the statements have been recorded from a material witnesses. The violation of rules in the taking of statements during the course of investigation cannot be got round by ignoring the investigation which preceded the formal lodging of the first information report as in this case. In *K. M. Nanavati* v. *State of Maharashtra*[1], Subba Rao, J., speaking for the Court observes :

> " But it is said that, as the information given by Puran Singh was not recorded by the police officer, Phansalkar as he should do under section 154 of the Code of Criminal Procedure, no investigation in law could have commenced within the meaning of section 156 of the Code. The question whether investigation had commenced or not is a question of fact and it does not depend upon any irregularity committed in the matter of recording the first information report by the concerned police officer. If so, section 162 of the Code is immediately attracted."

In our view the investigation in this case under Chapter XIV of the Code should be held to have commenced when G. K. Ranganathan, the Deputy Superintendent of Police started enquiry on 15th April, 1964.

Now we shall consider the effect of disregarding the provisions of sections 162 and 163 while gathering evidence during the course of investigation. The policy underlying the prohibition in section 162 against taking the signature of a maker of statement appears to be that the witness at the trial should be free to make any statement in favour of the petitioner which he may wish to make unhampered by anything which he might have said or might have been made to say to the police. The result of taking signature of the maker of statement to his statement would be to tie him down to the statement so recorded or at least to give him the impression that he is so tied down and would not be free to make a different statement. The maker of a statement may feel at the trial that he is not a free agent to give evidence. No doubt the evidence of the witness who has signed the statement, given in open Court at the trial does not on that account only become inadmissible. There are no words for such prohibition in the Code or the Evidence Act; nor can it be said that the entire proceedings and investigation get vitiated by taking signed statements. The effect of signature on a statement may be in most cases to seriously impair to the evidence of the witness. Witnesses of standing and culture and with trained minds who might have given signed statements may hardly be expected to depart from what they have stated if subsequently statements are recorded from them under section 164, Criminal Procedure Code, or evidence taken

1. (1962) M.L.J. (Crl.) 521 : (1962) 2 S.C.J. 347: (A.I.R. 1962 S.C. 605, 625.

in Court. They may feel that they have pinned themselves down by the former signed statements, however, it might have been obtained. No doubt the question in each case would be whether the wintess appeared to havebeen influenced by the impression that since he has given a signed statement to the police he is bound to repeat the same at the trial. The answer to this question would depend on the circumstances of each case, the nature and character of the evidence and the witnesses involved. In *Tahsildar Singh and another* v. *The State of Uttar Pradesh*[1], while discussing the objects sought to be achieved by section 162, Criminal Procedure Code, reference is made to the observations of Braund, J., in *Emperor* v. *Aftab Mohammed Khan*[2] :

> "As it seems to us it is to protect accused persons from being prejudiced by statements made to police officers who by reason of the fact that an investigation is known to be on foot at the time the statement is made may be in a position to influence the maker of it and, on the other hand, to protect accused persons from the prejudice at the hands of persons who in the knowledge that an investigation has already started, are prepared to tell untruths."

The following observation of a Division Bench of the Nagpur High Court in *Baliram Tikaram* v. *Emperor*[3], is also referred :

> "The object of the section is to protect the accused both against over-zealous police officers and untruthful witnesses ".

The Supreme Court also cites the following passsage from the judgment of the Judicial Committee in *Pakala Narayanswami* v. *The King Emperor*:[4]

> "If one had to guess at the intention of the Legislature in framing a section in the words used, one would suppose that they had in mind to encourage the free disclosure of information or to protect the person making the statement from a supposed unreliability of police testimony as to alleged statements or both."

In *Kotayya* v. *King Emperor*[5], their Lordships of the Judicial Committee noted that

> "Courts in India have always regarded any breach of the proviso to section 162 as matter of gravity."

True it has been observed by their Lordships of the Judicial Committee in *Zahiruddin* v. *Emperor*[6], that where in contravention of section 162, sub-section (1) of the Code of Criminal Procedure a witness has signed a statement made to a police officer which has been reduced into writing, the evidence given by the witness who signed it does not become inadmissible and still less can it be said that the contravention has the effect of vitiating the whole proceeding. Their Lordships observed that the value of his evidence, however, may be seriously impaired as a consequence of the contravention of the statutory safeguard. It is noted that when the Magistrate or presiding Judge discovers that a witness has, while giving evidence, made material use of a statement made by him to the police, it is the duty under section 162 sub-section (1) of the Code to disregard the evidence of that witness as inadmissible. That of course can happen only when the matter goes to trial. We have to consider the case under the amended provisions of the Criminal Procedure Code with reference to section 251-A. We will be adverting to this aspect of the matter presently.

An equally serious infraction of procedural safeguard during investigation alleged, is the giving of assurance of immunity from all prosecution to the subordinate officers who have given the statement. Admittedly two such assurances have

1. (1959) M.L.J. (Crl.) 759: (1959) 2 M.L.J. (S.C.) 201 : (1959) 2 An.W.R. (S.C.) 201 : (1959) S.C.J. 1043: (1959) 2 S.C.R. (Supp.) 875.
2. A.I.R. 1940 All. 291, 299.
3. A.I.R. 1945 Nag. 1, 5.
4. (1939) 1 M.L.J. 756 : L.R. 66 I.A. 66 : (1939) I.L.R. 18 Pat. 224, 248 P.C.
5. (1948) I.L.R. Mad. 1, 10 (P.C.) : (1947) 1 M.L.J. 219 :L.R. 74 I.A. 65.
6. I.L.R. (1948) 1 Cal. 179 (P.C.) : (1947) 1 M.L.J. 339 : L.R. 74 I.A. 80.

been given It is the petitioner's case that eighteen of the proposed witnesses had been given such assurances and the statements recorded from them. Section 163 of the Code in emphatic terms prohibits a police officer or other person in authority from offering or making or causing to be offered or made any inducement, threat or promise which would appear to a person from whom a statement is obtained grounds for supposing that by making the statement he would gain any advantage or avoid any evil of temporal nature. A police officer or a person in authority should, of course, not prevent by any caution or otherwise any person from making in the course of any investigation under the Code any statement which the person may be disposed to make of his own free will. Sections 160 to 164 of the Code must in this connection be read together. The reason behind the rules are obvious Where a statement is not make voluntarily but is the result of inducement or threat, there is a danger of the statement being false or at least biased. Referring to confessions obtained by inducement or threat, Williams, J., in *Reg.* v. *Mansfield*[1], said:

> "It is not because the law is afraid of having truth elicited that these confessions are excluded, but it is because the law is jealous of not having the truth."

The same could be said of the statements obtained by inducement of threat. The ground for prohibition in section 163 is that it would not be safe to receive a statement made under any influence or fear. Such statements may hamper the due course of administration of justice. They may divert investigation from proper channels. Equally such injunctions are necessary for keeping under check the wide powers of investigation and search which are likely to jeopardise the cherished freedom of personal liberty and reputation. Mr. V. K. Thiruvenkatachari stressed on the demoralising and debasing effect of an investigation vitiated by grant of full absolution at the discretion of police officers and securing statements from colleagues or subordinates in a public office or for that matter in any administrative department. If such procedure is condoned, it is submitted that any person who is approached for a statement may hesitate to refuse, as on his refusal others could be found in his place and the person refusing himself made a victim in his turn. The thesis is, no one is secure unless everyone is secure from the over-zealous investigating officer. The amnesty granted in this case purports to emanate from the Government and is of the widest character. We are not on the validity of these assurances whether in law it is worth the paper on which it is engrossed. Neither the Criminal Procedure Code nor the Prevention of Corruption Act recognises the immunity from prosecution guaranteed under these assurances. It must be noted that the witnesses to whom assurances are given are themselves guilty of offences. They are not just bribe givers to come under section 8 of the Prevention of Corruption Act. The grant of pardon is not in the discretion of the police authorities; it is a judicial function. Section 337 of the Code provides for tender of pardon to accomplices in certain cases. At any stage of the investigation or enquiry into or trial of the specified offences with a view to obtaining evidence of any person supposed to have been directly or indirectly concerned in or privy to the offences, conditional pardon could be tendered. Section 8 of the Prevention of Corruption Act provides that notwithstanding anything contained in any law for the time being in force, a statement made by a person in any proceeding against a public servant for an offence under section 161 or section 165 of the Indian Penal Code or under sub-section (2) of section 5 of the Prevention of Corruption Act that he offered or agreed to offer any gratification (other than legal remuneration) or any valuable thing to the public servant, shall not subject such person to a prosecution under section 165-A of the Penal Code. This is the only statutory immunity outside judicial pardon to which our attention has been drawn. Reference may be made to section 343 of the Code which runs thus :

> "Except as provided in sections 337 and 338, no influence by means of any promise or threat or otherwise, shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge."

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1. (1881) 14 Cox. C.C. 639.

It cannot be gainsaid that assurances outside the law which cannot grant immunity under the law are likely to interfere in the proper discharge of duties by public servants. The self-inculpatory statements they might have made would be hanging like a Damocles sword over them, and unless they are men of strong character and have made statements really voluntarily with a sense of responsibility to purify the administration and get rid of an incubus compelling them by his position to infamous acts, they may become handy stooges for unprincipled officers ready to take advantage of their plight. The danger of such statements is that the man getting fixed and pinned to a statement may readily seek further immunity by voluntarily accusing others if cornered. A statement so obtained can also vitiate any subsequent statement recorded under section 164, Criminal Procedure Code. In *Zahiruddin* v. *Emperor*[1], the Judicial Committee remarked that while the value of giving evidence may be seriously impaired as a consequence of the contravention of the statutory safeguard under section 162, Criminal Procedure Code, the use by a witness while he was giving evidence of a statement made by him to the police give rise to different considerations. Their Lordships observed at page 188 :

> "The categorical prohibition of such use would be merely disregarded if reliance were to be placed on the evidence of a witness who had made material use of the statement when he was giving evidence at the trial. When, therefore, the Magistrate or presiding Judge discovers that a witness has made material use of such a statement it is his duty under the section to disregard the evidence of that witness as inadmissible."

Now we are dealing with literate witnesses holding positions of responsibility in Government office. If they have been called upon to go through the formality of signing their statements, obviously it must be with a view to make them stick to it; then it is hardly likely that these persons would vary or depart from the signed statements they had made, when later making statements on oath before a Magistrate under section 164, Criminal Procedure Code. May be they will not be actually having on hand the statements previously made by them to gag them. But one may reasonably expect this class of persons, when called upon to state again what they have already stated, to at least previously refresh their memory as to what they had stated before and carry the same in their memory. Having pinned himself to a particular narration of facts in a signed statement, the maker would feel that when he is called upon to make a statement on oath before a Magistrate, he is not free to depart from his earlier statement. Thus the violation of the provision of sections 162 and 163 may impair a statement judicially recorded on oath under section 164.

Of course irregularities and illegalities during an investigation do not necessarily vitiate the entire proceedings. The guilt of an accused will be pronounced by Court on the evidence given at the trial and irregularities and illegalities during investigation will only affect the value of the evidence. When the case should go up for trial it will be for the trial Court to consider to what extent the testimony placed before Court is vitiated and to be discarded. If without any judicially recognised amnesty a person comes forward and gives evidence no doubt it is his look out. He is an accomplice and his evidence will be looked with suspicion as tainted. But the law does not make him an incompetent witness at the trial of another person in respect of an offence in the commission of which he is an accomplice. Section 133 of the Evidence Act provides that an accomplice shall be a competent witness against an accused person. We are not here concerned at the present stage with the quality of such evidence at the trial and what confidence it can inspire in Court. The learned Advocate-General referred to us in this connection to the decision of the Allahabad High Court in *Emperor* v. *Har Prasad Bhargava*[1]. In that case in proceedings against a Subordinate Judge for receiving

1. I.L.R. (1948) 1 Cal. 179 (P.C.) : L.R. 74 I.A. 80: (1947) 1 M.L.J. 339 (P.C.).

bribes, the Government issued a notification to the effect that no prosecution would be instituted by the Government against any person who came forward with evidence that he had paid or offered bribe to the particular officer whose case was under consideration. In consequence of this notification, two persons came forward and gave evidence against the Subordinate Judge, being undoubtedly accomplices as regards the offence with which the accused was charged. Of course this was long before we had on the statute book section 8 of the Prevention of Corruption Act. The relevant passage is at page 231 and runs thus :

> " From a legal point of view the only difference in the case now before us is that neither Bhagirath nor Mangal Chand was ever an " accused person " at the trial in which his evidence was tendered, within the meaning of the said section. The real effect of the argument addressed to us on behalf of the accused on this point is that there is a method by which the prosecution, keeping strictly within the four corners of the Code of Criminal Procedure, might, with the consent of the Court, have put Bhagirath and Mangal Chand into the witness-box against Har Prasad Bhargava, each of them fortified by a judicial order of acquittal which would have barred their subsequent prosecution. They actually gave evidence without any such shield, though relying upon an extra judicial undertaking that the Local Government would not direct their prosecution. Whether their testimony is entitled to greater or less credit on this account is a question to be considered, but it has nothing to do with the admissibility of the testimony. There is abundant case-law in support of the propositions which we have laid down."

Reference was also made for the State to the decision in *Anant* v. *Emperor*[2], where it is observed at page 319:

> " As to the assurance given to four persons, it is notorious that it is very difficult to get evidence in such cases of bribery, and I see nothing sinister in the fact that it was considered necessary in the present case to assure four people that they would not suffer by telling the truth."

But the principles laid down in these cases do not in the least detract from the validity of the objection taken to the statements recorded at the investigation and the consideration of those statements at the stage of framing charge under section 251-A. There has been deliberate violation of the provisions of the Code and a departure from the recognised and lawful procedure for investigation. When the law provides for a particular procedure and certain prohibitions are specifically indicated, these are there to be obeyed and not deliberately flouted. In *Nazir Ahmad* v. *The King Emperor*[3], the Judicial Committee while considering non-compliance with statutory provisions in regard to sections 164 and 364, Criminal Procedure Code, observed at page 641:

> " The rule which applies is............not less well recognised rule, namely, that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. This doctrine has often been applied to Courts—*Taylor* v. *Taylor*, *Taylor* v. *Keily*, Ex parte *Taylor*[4]."

In *State of U.P.* v. *Singhara Singh*[5], Sarkar, J., as he then was, referred to this rule thus:

> "The rule adopted in *Taylor* v. *Taylor*, *Taylor* v. *Keily*, Ex parte *Taylor*[4], is well recognised and founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is

1. (1922) I.L.R. 45 All. 226.
2. A.I.R. 1925 Nag. 313.
3. (1925) 71 M.L.J 476 : L.R. 63 I.A. 372 : (1936) I.L.R. 17 Lah. 629 (P.C.).
4. (1875) 1 Ch.D. 426, 431.
5. (1965) 1 S.C.J. 184, 186 : (1965) M.L.J. (Crl.) 72 : (1964) 4 S.C.R. 485.

that if this were not so, the statutory provision might as well not have been enacted."

A point made on behalf of the accused is that as statements under section 161 (3) obtained on assurance of immunity from prosecution will have to be discarded, one of the weapons in the armoury of the accused, the right to contradict the witnesses for the prosecution by reference to the statements recorded under section 162, is denied to the accused. It is, therefore, contended that the investigation should be struck down as illegal.

Like all procedural laws the provisions of the Code are designed to subserve the ends of justice and not to frustrate them. One has to see the effect, if any, of the breach of the provisions of the Code in the advancement of justice, whether the illegality or irregularity is one that can be cured or is cured and whether the accused would be prejudiced by its presence. The Code itself does not define what is irregularity and what is illegality and as pointed out by the Supreme Court in *Willie (William) Slaney* v. *The State of Madhya Pradesh*[1], illegality can only mean an incurable irregularity, incurable because of the prejudice leading to failure of justice, and the question of prejudice being a question of fact has to be decided by Court in each particular case. Imam, J. concludes his judgment in that case with the following observations:

"In conclusion I would point out that the provisions of the Code of Criminal Procedure are meant to be obeyed. Contravention of its provisions are unnecessary and neither the prosecution nor the Courts of trial should ignore the provisions in the hope that they might find shelter under sections 535 and 537 of the Code. Where the contravention is substantial and a retrial becomes necessary, public time is wasted and the accused is put to unnecessary harassment and expense."

In view of the amended procedure to be adopted in warrant cases instituted on police report under section 251-A, Criminal Procedure Code, statements recorded under section 162 have become more important. While prior to the amendment of the Code in 1955 the use of the statement under section 161, Criminal Procedure Code, was limited, after the amendment of the Code in 1955 the statement has vital role to play at a crucial stage of the procedure in the enquiry of cases triable by Court of Sessions and in the trial of warrant cases under sections 207-A and 251-A of the Code. It is necessary to set out the following portions in section 173, Criminal Procedure Code :

" 173. (1) Every investigation under this Chapter shall be completed without unnecessary delay, and, as soon as it is completed, the officer-in-charge of the police station shall—

(*a*) forward to a Magistrate empowered to take cognizance of the offence, on a police report, a report in the form prescribed by the State Government setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case, and stating whether the accused if arrested has been forwarded in custody, or has been released on his bond, and, if so, whether with or without sureties......

(4) After forwarding a report under this section the officer-in-charge of the police station shall before the commencement of the inquiry or trial furnish or cause to be furnished to the accused, free of cost, a copy of the report forwarded under sub-section (1) and of the first information report recorded under section 154 and of all other documents or relevant extracts thereof, on which the prosecution proposes to rely, including the statements and confessions, if any, recorded under section 164 and the statements recorded under sub-section (3) of section 161 of all the persons whom the prosecution proposes to examine as its witnesses."

1. (1956) S.C.J. 182 : (1956) 1 M.L.J. (S.C.) 100 : (1955) 2 S.C.R. 1140, 1195.

The relevant provisions of section 251-A under which the present enquiry is being proceeded with are:

"251-A (1) When, in any case instituted on a police report the accused appears or is brought before a Magistrate at the commencement of the trial, such Magistrate shall satisfy himself that the documents referred to in section 173 have been furnished to the accused, and if he finds that the accused has not been furnished with such documents or any of them, he shall cause them to be so furnished.

(2) If, upon consideration of all the documents referred to in section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge him.

(3) If, upon such documents being considered, and examination, if any, being made and the prosecution and the accused being given an opportunity of being heard, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try, and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

(4) The charge shall then be read and explained to the accused and he shall be asked whether he is guilty or claims to be tried.........................."

It will be seen that under section 251-A no provision is made for examination of a witness before making an order under sub-section (2) discharging the accused or under sub-section (3) framing a charge. It will be interesting to compare these provisions with the provisions of sections 252 to 255, Criminal Procedure Code, in respect of warrant cases instituted otherwise than on police report. In such cases there is provision for taking evidence by the Court before framing of charge. The procedure has been simplified in cases taken cognizance on police report by reason of the provision for previous enquiry and investigation by a competent police officer. A trained person has collected the evidence that would be available at the trial. As noticed in *Ramnarayan Mor and another* v. *State of Maharashtra*[1].

"In a warrant case therefore there will be no evidence of witnesses and the examination of the accused if found necessary by the Magistrate must of necessity be restricted to the circumstances appearing from the documents under section 173 (4). The Legislature has therefore in enquiries in warrant cases contemplated examination of the accused solely upon circumstances appearing from the documentary evidence referred to in section 173 (4) and it cannot be assumed that the examination of the accused in respect of circumstances appearing from those documents which are not proved but of which copies have been furnished to the accused, is so inconsistent with principles of criminal jurisprudence that it must be discountenanced."

While referring to the change in the procedure that had been brought about at the same time in committal proceedings by section 207-A of the Code which their Lordships had to consider in the above case, it is observed at page 1076:

"Normally in a criminal trial, the Court can proceed on documents which are duly proved, or by the rules of evidence made admissible without formal proof, but under the amended Code the Legislature has in section 207-A prescribed a special procedure in proceedings for commitment of the accused. The record consists of the oral evidence recorded under sub-section (4) of section 173, and it would be difficult to regard only those documents which are duly proved, or which are admissible without proof as "evidence" within the meaning of clause (6) (of section 207-A) and not the rest. There is no substance in the

1. (1964) 5 S.C.R. 1064 at page 1078 : A.I.R. 1964 S.C. 949.

contention that the Legislature could not have intended that the accused should be examined in respect of documents which are not duly proved before the Court, because to do so might in some cases operate as "a trap for the accused." The object of the examination it may be remembered is to afford an opportunity to the accused to explain any circumstances appearing against him."

Under the amended procedure relating to warrant cases instituted on police report also the documents referred to in section 173 of the Code are the material on which the accused has to be discharged or charges framed and the accused made to stand on his trial. The examination of the accused by the Magistrate at that stage can only be with reference to the documents. The documents referred to under section 173 which thus now have positive role in the framing of charges, include the statements and confessions, if any, recorded under section 164 and the statements recorded under sub-section (3) of section 161 of all the persons whom the prosecution proposes to examine as its witnesses. While prior to the amendment of the Code in 1955 statements recorded at the investigation stage had a limited use, though important from the point of the accused, now they provide the basis for the framing of charge. Prior to the amendment statements made by prosecution witnesses of the investigation, being the earlier statements made by them with reference to the facts of the case, were valuable material for testing the veracity of the witnesses examined in Court with particular reference to their recorded statements when they happend to be at variance. Such statements were considered only with a view to weigh the evidence actually adduced in Court. Now as pointed out above, they are in a sense evidence, though only at the stage of enquiry before framing charge and for framing charge. The Evidence Act defines evidence to mean and include also all documents produced for inspection of Courts. In *Ramanarayan Mor and another* v. *State of Maharashtra*[1], the documents referred to in section 173 (4) are considered as part of the evidence mentioned in section 207-A. As these documents are the matter which a Magistrate has to consider under sections 251-A (2) and (3), it would be open to the prosecution and the accused to rely upon or refer to them in support of their respective contentions, when they exercise the right of being heard under sub-clauses (2) and (3) of section 251-A. Section 162 (1) while prohibiting the signing of statements recorded under section 161 (3) by the person making the statements places an embargo on its user for any purpose subject to the latter provision in the Code.

"nor shall any such statement.............be used for any purpose save as hereinafter provided."

Sections 207-A and 251-A provide for the user of these statements at the stage of committal or framing charge as the case may be. In *Ukha Kolhe* v. *State of Maharashtra*[2], it is stated :

"Exclusion from evidence of any part of a statement made to a police officer or a record from being used for any purpose at any enquiry or trial in respect of an offence under investigation at the time when such statement was made in "save as hereinafter provided". The word "hereinafter" is in our judgment not restricted in its operation to section 162 alone, but applies to the body of the Code; to hold otherwise would be to introduce a patent inconsistency between section 207-A and section 162 of the Code, for by the former section in committal proceeding, statements recorded under section 162 are to be regarded as evidence".

Such being the scope of section 251-A, infraction of the provisions of the Code in the matter of investigation brought to the notice of the Court before the framing of charge cannot be passed over leaving the accused to stand trial for charges framed on material gathered in violation of the provisions of the Code. No doubt illegality

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1. (1964) 5 S.C.R. 1064 : A.I.R. 1964 S.C. 949.

2. (1964) 1 S.C.R. 926 : A.I.R. 1963 S.C. 1531, 1542.

committed in the course of investigation does not affect the competence or jurisdiction of the Court for trial. Where cognizance of case had in fact been taken and the case had proceeded to termination, the invalidity of the preceding investigation, it has been held repeatedly, does not vitiate the result, unless miscarriage of justice has been caused thereby. But the position would be different, if the illegality is discovered at the early stage of the proceeding. In *State of M.P.* v. *Mubarak Ali*[1], an objection was taken before the trial began before the Special Judge that the investigation had been carried on in violation of section 5-A of the Prevention of Corruption Act. The Order of the High Court in the matter providing for rectification of the defect and curing of the illegality in the investigation directing the Special Judge to order the Deputy Superintendent of Police to carry on investigation while the case remained pending on the file of the Special Judge was upheld by the Supreme Court. In *H. N. Rishbud and Inder Singh* v. *The State of Delhi*[2], after observing that where cognizance of the case has in fact been taken and the case has proceeded to termination the investigation will not vitiate the result unless miscarriage of justice has been caused thereby, it is stated by Jagannadha Das, J. :

> "It does not follow, however, that the invalidity of the investigation is to be completely ignored by the Court during trial. When the breach of such mandatory provision (section 5 (4) and proviso to section 3 of the Prevention of Corruption Act and section 5-A of the Act) is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering such reinvestigation as the circumstances of an individual case may call for.............. When the attention of the Court is called to such an illegality at a very early stage it would not be fair to the accused not to obviate the prejudice that may have been caused thereby, by appropriate orders, at that stage but to leave him to the ultimate remedy of waiting till the conclusion of the trial and of discharging the somewhat difficult burden under section 537 of the Code of Criminal Procedure of making out that such an error has in fact occasioned a failure of justice. It is relevant in this context to observe that even if the trial had proceeded to conclusion and the accused had to make out that there was in fact a failure of justice as the result of such an error, explanation to section 537 of the Code of Criminal Procedure indicates that the fact of the objection having been raised at an early stae of the proceeding is a pertinent factor. To ignore the breach in such a situation when brought to the notice of the Court would be virtually to make a dead letter of the peremptory provision which has been enacted on grounds of public policy for the benefit of such an accused."

Learned Counsel for the petitioner attacked the propriety of taking self-incriminatory statements even in cases where there has been no assurance of immunity from the prosecution. Some of these persons have admitted making manipulations in the nominal muster rolls to reimburse themselves the cost of valuable things provided for the petitioner. It is unnecessary for us to examine at length the question whether these admissions in the statements which are confessions of guilt should be discarded by the Special Judge, as the learned Advocate-General, to a specific question from Court, stated that the record of such manipulations has to be discarded as not proper material for consideration. The learned Special Judge has not considered these vitiating features in regard to the documents that have been placed before him while ordering the framing of charges against the petitioner.

In the light of the above discussion, it is clear that the present order of the Special Judge directing the framing of charge on consideration of the statements before him under section 173 (4), Criminal Procedure Code, without reference to the illegalities

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1. (1959) S.C.J. 843: (1959) 2 S.C.R. (Supp.) 201 : (1959) 2 M.L.J. (S.C.) 105 : (1959) 2 An. W.R. (S.C.) 105 : (1959) M.L.J. (Crl.) 571 : A.I.R. 1959 S.C. 707.

2. (1955) 1 M.L.J. (S.C.) 173 : (1955) S.C.J. 283 : (1955) 1 S.C.R. 1150, 1164.

in the investigation has to be quashed. The Special Judge will have to take up the matter once again and consider the case excluding from consideration all statements recorded under sections 161 (3) and 164 which are found vitiated in the light of the observations made herein. The Special Judge will also exclude while considering the statements which are not otherwise violative of sections 162 and 163 of the Code, portions of the statements which are self-incriminatory and confessional in character of the maker.

The State has preferred Criminal Revision Case No. 294 of 1965 questioning the view of the Special Judge that no charge could be framed in the case under section 5 (1) (*b*) of the Prevention of Corruption Act read with section 5 (2) of the Act. The Special Judge agreed with the contention on behalf of the accused that section 5 (1) (*b*) of the Prevention of Corruption Act like section 165, Indian Penal Code, was designed to cover only cases of receipt of valuable things by public servant from third parties who have any business before him and not from officers subordinate to him. It is not the case for the prosecution that the documents warrant a charge for receipt of valuable things from third parties who are not subordinate of the petitioner. Their contention is that the sub-section would include acceptance of valuable things from subordinates. The Special Judge has taken the view that the offence would come under section 5 (1) (*d*) of the Act, that is, by corrupt or illegal means or by otherwise abusing his position as public servant, he has obtained for himself or for any other person any valuable thing or pecuniary advantage. In our view the interpretation placed by the Special Judge on section 5 (1) (*b*) is correct. The language used in section 5 (1) (*b*) is identical with the language of section 165, Indian Penal Code. Though the illustrations to the section cannot govern its interpretation, the illustrations under section 165, Indian Penal Code, are at any rate where there is ambiguity, indicative of the scope of the section. The illustrations refer to receipt of valuable things from third parties. The material portion of section 5 may be set out :

5. (1) A public servant is said to commit the offence of criminal misconduct in the discharge of his duty,—

....

(*b*) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate, from any person whom he knows to have been or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned;

....

(*d*) if he, by corrupt or illegal means or by otherwise absuing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage.

In our reading of the section the acceptance of valuable things which constitutes an offence of criminal misconduct is acceptance, (i) from any person (whom he knows to have been or to be likely to be) (*a*) concerned in any proceeding or business transacted or about to be transacted by him or (*b*) concerned in any proceeding or business having any connection with the official functions of himself or of any public servants to whom he is subordinate, and (ii) from any person whom he knows to be interested in or related to the persons so concerned as in (i) (*a*) or (*b*). It is not contended for the prosecution that the words *having any connection with the official functions of himself* are to be red as qualifying *any person*. It is difficult to include the subordinates of an officer as persons concerned in any business transacted or to be

transacted by him. It is not contended that on the facts of this particular case the subordinate officers were in any way concerned in any proceedings before the accused.

In the result Writ Petition No. 391 of 1965 and Criminal Miscellaenous Petition No. 934 of 1965 are allowed. The order, dated 16th January, 1965 of the Special Judge in Criminal Miscellaneous Petition No. 86 of 1964, is quashed. The Special Judge is directed to take up the matter for fresh consideration in the light of the observations made above. Writ Petition No. 390 of 1965 and Criminal Revision Case No. 294 of 1965 fail and are dismissed. No costs in the Writ Petitions.

R.M. ——— *W. P. No.* 391 *and Crl. M. P No.* 934 *of* 1965 *allowed. W. P. No.* 390 *and Crl. R.C. No.* 294 *of* 1965 *dismissed. Matter remitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE T. RAMAPRASADA RAO.

Palaniswami Naicker .. *Appellant**

v.

Chinnaswami Naicker .. *Respondent.*

Easements Act (V of 1882), *sections* 4, 13 (*e*) *and* (f) *and section* 15—*An easement of way—Requirements—Existence of dominant and servient tenements—An easement being appurtenance to the dominant tenement, passes with the property—Omission to mention in the conveyance—Effect—Suit pathway apparent and continuous for nearly* 25 *years—Easement by prescription.*

Pleadings—Alternative plea—Either of ownership or easement of the suit pathway—If permissible.

An easement of way being an affirmative easement enabling the dominant owner to use the servient tenement, ought to be continuous and apparent. It should be peaceably and openly enjoyed as of right and as an easement. It may have its origin in a statute or in an express or implied grant or acquired by prescription. Such a prescriptive right of way can be destroyed only by a totality of cessation of the exercise of such a right. As the definition postulates, the interruption of the course of way should be significant. In the instant case, there is no acceptable evidence to show that there has been a telling interruption leading to a normal presumption as to extinguishment of the right of way originally created by the instrument of 1890. A right of way enjoyed as an easement of another" land passes with the transfer of the dominant tenement, whether it be by alienation or succession. An easement being an appurtenance to the dominant tenement, passes with the property and it cannot be destroyed or extinguished by the casual omission of a draftsman while drawing up a conveyance deed. Thus the omission of the suit pathway in Exhibit B-2 dated 24th March, 1904, and of the existence of the accredited easement of way in question over the southern portion is not a material circumstance so as to delimit in any way the vested right in the plaintiff. But it should be noted that in the Exhibit, dated 23rd June, 1932, this right is expressly mentioned.

It is also indisputable in this case that there exists the dominant and servient tenements. Therefore, the easement of way provided in the instrument of 1890 got itself attached to the northern portion of the originally composite land. It is therefore not a right *in personam* but a right *in rem.*

From the evidence in this case it is clear that the suit pathway is apparent and continuous for nearly 25 years. Therefore, there is little difficulty in holding that the easement in this case is one which has been secured by prescription and enjoyed as such. The easement should be deemed to have been secured within the meaning of section 15 of Indian Easements Act.

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* S.A. No. 369 of 1963. 12th January, 1967.

Held also that, such an alternative plea (*i.e.*, either of ownership or of easement) even if it could be presumed to have been pleaded in the instant case by the plaintiff, is permissible provided the plaintiff presses only one of them at the appropriate time. The plaintiff in this case had relied on the right of easement of way at all material times. Therefore, the plaintiff cannot be non-suited on that account.

Appeal against the Decree of the Sub-Court, Dindigul, in A.S. No. 14 of 1961 preferred against the Decree of the District Munsif's Court, Palani, in O.S. No. 74 1960.

T. P. Gopalakrishnan, for Appellant.

T. R. Ramachandran and *K. Narayanaswamy*, for Respondent.

The Court delivered the following

JUDGMENT.—The defendant is the appellant in this second appeal. Both the Courts below described the suit as a suit for declaration and mandatory injunction. But, on a fair reading of the plaint, it is clear that the plaintiff asked for a declaration that he is entitled to use the pathway in question for taking his cart, cattle, etc., and consequently asked for a permanent injunction restraining the defendant or his men from obstructing such user by the plaintiff of the suit pathway. In effect, therefore, the suit is for a declaration of right to use the suit pathway. Learned Counsel for the appellant took me through paras. 5, 6, 7 and 8 of the plaint to show that the relief asked for by the plaintiff is one for a declaration that he is entitled to an easement or right of way within the meaning of section 15 of the Easements Act and that in substance and in effect the suit is not one for declaration of ownership of the suit property in the appellant.

The plaintiff purchased the property marked *ABCDE* in the sketch annexed to the plaint under Exhibit A-4 dated 23rd June, 1932. In this document an express mention is made that the plaintiff and his successors in interest are entitled to a right of ingress and egress over the suit property *DCKMLGH* in the sketch. The plaintiff's predecessor-in-interest, however, purchased this very property *ABCDE* under the sale deed Exhibit B-2, dated 24th March, 1904, wherein no mention is made about the suit pathway *DCKMLGH*. It is however alleged in the plaint that the plaintiff's predecessor-in-interest as well as the plaintiff were using the pathway *DCKMLGH*, which will be hereinafter referred to as the suit pathway, for taking out their cattle from the property *ABCDE*. In fact, the plaintiff, in his plaint as well as by oral evidence, sought to establish that his claim to use and to have a right of way over the suit pathway was well over 22 years, and such user was uninterrupted and that therefore he had secured an easementary right within the meaning of section 15 of the Easements Act. The defendant however contended that the suit pathway was not in existence and the plaintiff did never secure any right known to law to use the same and claim a right over it. On a dismissal of the suit by the District Munsif the plaintiff appealed and the first appellate Court reversed the decision of the learned District Munsif and found that the suit pathway was absolutely necessary for the enjoyment of the property *ABCDE* and that such a right ran with the land. He also found, as a matter of fact, that the suit pathway always existed and believed the oral evidence let in on the side of the plaintiff that the disputed pathway was in the enjoyment of the plaintiff and his predecessors for well over 20 years. He did not agree with the contentions raised before him that the suit as framed was not for the declaration of an easement right, but appears to be for a declaration of ownership in the suit pathway, and came to the conclusion that a legal inference as to the existence of the right in favour of the plaintiff could be drawn from the evidence, oral and documentary, adduced in the case. The learned Subordinate Judge ultimately found that there was a pathway as alleged by the plaintiff over which he had a right of easement, which he characterised as easement of necessity within the meaning of section 13 (*e*) of the Easements Act. He therefore upheld the claim of the plaintiff and decreed the suit.

The defendant has come up in appeal to this Court on the judgment of the learned Subordinate Judge. Mr. T. P. Gopalakrishnan, learned Counsel for the appellant, pressed before me the following points . (1) The claim of the plaintiff as initiated by him in the pleadings is one for ownership of the suit pathway and therefore he is not entitled to a declaration that he has secured an easement right under the provisions of the Easements Act, and such a legal inference drawn by the lower appellate Court consequentially securing a legal right which was not asked for in the plaint cannot be envisaged and granted, and that therefore the suit as framed is not maintainable. In support of his contention, the learned Counsel referred to the decision reported in *Imamdin* v. *Nizam Dian*[1]. The observation of the lower appellate Court that the easement in question is an easement of necessity is unsustainable in view of the decisions reported in *Krishnamaraju* v. *Marraju*[2], and *Subba Rao* v. *Lakshmana Rao*[3].

Learned Counsel for the respondent would state that the property *ABCDE* was parcelled out of a composite property which was originally in the family of one Kothu Subba Naicker and the composite property was divided into two, the northern and the southern portions, and one branch of the family retained the northern portion and the other branch the southern portion. By subsequent alienation by the members of the erstwhile family which originally owned the composite property the plaintiff became the owner of the property *ABCDE* (the northern portion) under Exhibit A-4, dated 23rd June, 1932, hereinafter referred to as dominant tenement, and the defendant's father and his brothers secured the southern portion of the composite property under the document Exhibit A-3, dated 27th May, 1890, hereinafter called the servient tenement. In fact, the defendant's father purchased the portion that fell to the share of his brothers and thus became the sole owner of the southern portion. In Exhibit A-3, specific mention is made about the suit property. The recital in this document in so far as it concerns the suit path, is as follows .

"*சின்ன வெங்கிடுசாமி நாயகருக்கு பாதை விட்டுப்போட்டு.*"

It was sought to be contended that the scope of the recital is that when the members of the ancient family divided and partitioned their composite holdings a personal privilege only was granted to Chinna Venkatasami Naicker. The learned Subordinate Judge rightly observed that this right given to Chinna Venkatasami Naicker under Exhibit A-3 cannot be deemed to be a personal privilege granted to him, but a legal inference should be drawn that a right of way in the nature of a burden over the suit pathway in question was for ever created under that document at the time of partition. I do not agree with the observation of the learned District Munsif that it was a right or privilege conferred on Chinna Venkataswami Naicker. The learned Subordinate Judge rightly observed that this right given to Chinna Venkatasami Naicker under Exhibit A-3 cannot be deemed to be a personal privilege granted to him, but a legal inference should be drawn that a right of way in the nature of a burden over the suit pathway in question was for ever created under that document at the time of partition. I do not agree with the observations of the learned District Munsif, that it was a right or privilege conferred on Chinna Venkatasami Naicker, because he happened to be the co-owner of the property. If really, as is sought to be made out before me, there are other openings available to the land *A B C D E*, particularly in the north and its west, it is unnecessary to provide expressly a pathway in the southern portion of the composite property so as to create a right of way therein for the owners of the northern portion of the property. In this view, it cannot be said that the right given to Chinna Venkatsami-Naicker under the deed of partition Exhibit A-3, dated 27th May, 1890 is a right which is extinguished on the death of Chinna Venkatasami Naicker and that it does not pass along with the land or from generation to generation to the owners of the

1. A.I.R. 1933 Lah. 267.
2. (1905) I.L.R. 28 Mad. 495 : 15 M.L.J. 255.
3. (1926) I.L.R. 49 Mad. 820.

northern portion of the land. I am not satisfied that the learned District Munsif, in brushing aside the evidence of disinterested witnesses like P.Ws. 1 and 3, has given any acceptable reason for the same.

"Easements" is defined in section 4 of the Indian Easements Act, 1882, as follows:

> "An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land to do and continue to do something are to prevent and continue to prevent something being done, in or upon or in respect of certain other land not his own.
>
> The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof, the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof, the servient owner."

Section 13 (*e*) and (*f*) provide as follows :

> "Where a partition is made of the joint property of several persons (*e*) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement; or (*f*) if such an easement is apparent and continuous and necessary for enjoying the share of latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement."

Section 15 of the Act *inter alia* provides:

> "............where a right of way or any other easement has been peaceably and openly enjoyed by any persons claiming title thereto, as an easement, and as of right, without interruption and for twenty years........*Explanation II.* Nothing is an interruption within the meaning of this section unless there is an actual cessation of the enjoyment by reason of an obstruction, by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorising the same to be made."

In fact the *Attorney-General for Southern Nigeria* v. *John Holt*[1], their Lordships of the Privy Council explained the term ' easement ' as meaning :

> "Those occasional rights which an owner or occupier of a land may possess in addition to his ordinary rights of property which are legally exercisable by him within the boundaries of his own land."

We are concerned in this case with an easement of way.

An easement of way being an affirmative easement enabling the dominant owner to use the servient tenement, ought to be continuous and apparent. It should be peaceably and openly enjoyed as of right and as an easement. It may have its origin in a statute or in an express or implied grant or acquired by prescription. Such a prescriptive right of way can be destroyed only by a totality of cessation of the exercise of such a right. As the definition itself postulates, the interruption of the course of way should be significant. In the instant case, there is no acceptable evidence to show that there has been a telling interruption leading to a normal presumption as to extinguishment of the right of way originally created by the instrument of 1890. Can it be said that there has been a snap in the chain of continuity of the assessment by the non-mention of the same in Exhibit B-2 which is the sale deed in favour of the predecessor in title of plaintiff. A right of way enjoyed as an easement of another's land passes with the transfer of the dominant tenement, whether it be by alienation or succession. In my opinion, the omission to mention the obvious in a conveyance deed is immaterial. Of course, when such a recital is there, it may be considered as supporting evidence. An easement being

1. L.R. (1915) A.C. 599.

an appurtenance to the dominant tenement, passes with the property and it cannot be destroyed or extinguished by a casual omission of a draftsman while drawing up a conveyance deed. Thus the omission of the suit pathway in Exhibit B-2 and of the existence of the accredited easement of way in question over the southern portion is not a material circumstance so as to delimit in any way the vested right in the plaintiff. It should not however be forgotten that Exhibit A-4 dated 23rd June, 1932, this right is expressly mentioned. As already stated, disinterested witnesses examined on the side of the plaintiff have spoken to the user of the suit pathway by the dominant owner. It is however contended that the right of way granted under Exhibit A-3 is a personal right to Chinna Venkataswami Naicker. In my opinion it is not so. We have seen the express provision in section 13 (*e*) and (*f*) of the Easements Act. It is indisputable in this case that there exists the dominant and the servient tenements. Therefore, the easement of way provided in Exhibit A-3 got itself attached to the northern portion of the originally composite land. It is therefore not a right *in personam* but a right *in rem*. As observed in *Krishna Iyer* v. *Venkatachala Mudali*[1].

"An easement is an incorporated right exercised in, or over, corporeal property for the beneficial enjoyment of other corporeal property."

This leads on to the question as to what is the nature of the easement secured by the dominant owner in the instant case. Reliance is placed by learned Counsel for the appellant on the decision *Krishnamaraju* v. *Marraju*[2]. That was a case wherein the partition deed, whilst it makes special provision for giving means of access to the various portions of the partitioned property is silent as to the means of access over the appellant's share therein, which was claimed by the respondent in that case. In fact, their Lordships say that the respondent therein failed to establish any right by agreement. In those circumstances, their Lordships were of the view that if "*A*" has a means of access to his property without going over *B's* land, *A* cannot claim a right of way over *B's* land on the ground that it is the most convenient means of access. The word "necessary', their Lordships observed, must be construed in its ordinary sense. This decision, however, is not strictly applicable to the facts of this case. In Exhibit A-3, there is an express recital that a right of way is given to the dominant owner over the suit pathway in the southern portion. There is also oral evidence by neighbours who are not interested in the litigation, to show that the suit pathway was enjoyed as of right and as of easement by the dominant owner for nearly twenty years. The question however, remains whether in the instant case the easement can strictly be said to be an easement of necessity. Learned Counsel for the respondent does not put his case in this extreme fashion, but submits that the easement in question is one acquired by prescription. In *Subba Rao* v. *Lakshman Rao*[3], the following passage which found favour with their Lordships constituting the Full Bench is very apposite in this case—

"An easement by prescription is capable of being acquired only if the user during the statutory period has been with the animus of enjoying the easement as such in the land of another and not if the user had been in the consciousness of one's own ownership over the same."

The question of animus, no doubt, is always one of fact. Even from the sketches filed along with the plaint and shown to me at the hearing, it is clear that the suit pathway is not only apparent, but continuous. If, thus the suit pathway is apparent and continuous, there is little difficulty in holding that the easement in this case is one which has undoubtedly been secured by prescription and enjoyed as such, if not as an easement of necessity. See *Morgan* v. *Kirey*[4]. Apart from this, easement should be deemed to have been secured within the meaning of section 15 of Indian Easements Act already cited.

1. (1871-74) 7 M.H.C.R. 60.
2. (1905) I.L.R. 28 Mad. 495 : 15 M.L.J. 255.
3. (1926) I.L.R. 49 Mad. 820.
4. (1878-80) I.L.R. 2 Mad. 46.

Though I am *prima facie* inclined to agree with the first appellate Court that the easement in question is an easement of necessity, I would like to add that I am persuaded to accept the argument of the learned Counsel for the respondent that it is an easement right secured by prescription as well. As the suit pathway is apparent, clear cut and contiguous, the easement right can safely be presumed to be in existence for well over the statutory period, as such a pathway was demarcated in the document dated 27th May, 1890 and reiterated in Exhibit A-4 dated 23rd June, 1932. I also accept the contention of the respondent that such an easement acquired by the plaintiff has not been factually or in a manner known to law been extinguished.

One other argument put forward by the learned Counsel for the appellant is that the plaintiff should be deemed to have based his claim as if he is the owner of the suit pathway and inconsistently pleaded that he has no easementary right over the same. There being such inconsistency in pleadings, the plaintiff has to be non-suited. I have already referred to the material paragraphs in the plaint. To support his contention, learned Counsel relied on *Imam Din* v. *Nizam Dian*[1]. A single learned Judge of the Lahore High Court held as follows :

> " The power of Court to grant general or other relief not specifically claimed while undoubted is always subject to the condition that the relief so granted is not inconsistent with that specifically claimed and with the case raised by the pleadings. A right of ownership and a right of easement are two totally distinct things. One is the right to hold, use and enjoy land or things to the exclusion of every one else, while a right of easement is a right in, to or over the property of another. One is a personal right while the other is annexed to the adjoining land or property (the dominant tenement) and runs with it. A relief arising out of a claim founded on the one is utterly inconsistent with relief on a claim based on the other."

A Full Bench of the Calcutta High Court, however, in *Narendranath Barari* v. *Aboy Charan Chatopadhyaya*[2], took a contrary view. Their Lordships are specifically of the view that a suit for declaration that a ditch belonged to the plaintiff or in the alternative they have acquired a right of easement therein for the passage of their boats is not liable to be dismissed because the plaintiffs claimed in the alternative over the same plot of ground rights (1) of ownership, (2) of easement. Respectfully accepting the ratio of the Full Bench of the Calcutta High Court, I hold that such an alternative plea as above, even if it could be presumed to have been pleaded in the instant case by the plaintiff, is permissible provided the plaintiff presses only one of them at the appropriate time. The plaintiff relied on the right of easement of way at all material times. In the view, therefore, already expressed by me that the plaintiff has secured the right of easement by prescription, though not as an easement of necessity the plaintiff is entitled to succeed in this case. The second appeal is therefore dismissed, but in the circumstances of the case there will be no order as to costs. No leave.

V.M.K. *Second Appeal dismissed.*

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1. A.I.R. 1933 Lah. 267.
2. (1907) I.L.R. 34 Cal. 51.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VEERASWAMI AND MR. JUSTICE NATESAN.

A. T. Ramaswami Naicker .. *Appellant**

v.

Ganapathiammal and others .. *Respondents.*

Limitation Act (*IX of* 1908), *Articles* 10 *and* 123—*Will vesting all the properties of the testator and imposing certain obligations on the first defendant—Filing of the suit by heirs of the testator after the expiry of* 12 *years after attaining majority—Suit, if barred by limitation—First defendant an express trustee.*

The testator died on 28th March, 1927, leaving 3 minor daughters. The will vested all the properties of the testator in the first defendant, but certain obligations were also imposed on him for the benefit of the three plaintiffs (daughters of the testator). The first plaintiff became major in February, 1939, the second plaintiff in 1938 and the third plaintiff in August, 1944. Under the will, the plaintiffs had to be given the lands and cash of Rs. 6,000 to each of the plaintiffs. The suit was filed on 4th April, 1959.

Are the claims of the plaintiffs barred under Article 123 of the Limitation Act of 1908?

Under Article 123, a suit for legacy or for a share or residue bequeathed by a testator has to be instituted within 12 years after the legacy share becomes payable or deliverable. On the other hand, for the application of section 10, the property must be vested in the first defendant as an express trustee. But once it is found that the person in possession fills the requirement, no period of limitation avails him. From a reading of the will, it is manifest that the first defendant is made an express trustee in respect of the obligations imposed under the will. The benefits conferred on the daughters by the will are not legacies simpliciter. All the properties of the testator are vested in the first defendant absolutely in ownership and certain obligations are imposed on him in relation to that ownership. He is enjoined by the will to get the daughters married, take care of them as guardian, give each of them a sum of Rs. 1,000 for jewels and also give each of them two acres of well-fed lands and 5 acres of rain-fed lands, besides cash of Rs. 6,000 to each of them as stridhanam on their becoming majors. Clearly the properties of the testator are vested in the first defendant for certain specific purposes the essential elements required to attract section 10 of the Limitation Act. A person is an express trustee when he is entrusted by the owner with the properties for the discharge of particular obligations. Thus, in the present case, the properties having been bequeathed to the first defendant upon trust to hand over some of the properties to the daughters of the testator at the appropriate time, the suit is not barred by limitation.

Appeals against the Decree of the Subordinate Judge of Ramanathapuram at Madurai in Original Suit No. 20 of 1959.

G. Ramanujam and *P. Guru Ramachandran*, for Appellant.

R. Gopalaswamy Ayyangar, *A. Alagiriswami*, *V. Ramaswamy* and *K. Venkataswamy*, for Respondents.

The Judgment of the Court was delivered by

Natesan, J.—These two appeals arise out of the suit, Original Suit No. 20 of 1959, on the file of the Subordinate Judge's Court, Ramanathapuram, at Madurai, and relate to the estate of one Rangaswami Naicker who died on 28th March, 1927.

* A.S. No. 214 and 462 of 1961. 31st August, 1966.

The three plaintiffs in the suit are his only children, all daughters, and the first defendant is his divided nephew. The other defendants to the suit are sons of the first defendant. Rangaswami Naicker's brother Thirupathy Naicker had died leaving the first defendant and another son who died subsequently both minors. The partition between Rangaswami Naicker and the first defendant was in September, 1921, during the minority of the first defendant amicably brought about and fair in all respects. The evidence shows that despite the partition, the uncle and nephew were living together with affection towards each other. Rangaswami Naicker had taken three wives in the hope of having a male issue; but each wife had only a female child, the three plaintiffs in the suit. At the time of his death, the first plaintiff was about five years old, the second plaintiff about six years old, and the third plaintiff just 1½ years old. All the wives were dead and the first defendant himself was then about 21 years old. The evidence is that the step-mother of the first defendant was looking after the family of Rangaswami Naicker and was also bringing up these motherless children. The principal contest in the case is about the genuineness of a will stated to have been left by the deceased Rangaswami Naicker. It was executed by him on the very day he died, that is on 28th March, 1927, and under it the first defendant took possession and control of the estate of Rangaswami Naicker on his death. The suit impugning the will and claiming against the first defendant possession of the properties of Rangaswami Naicker and an account of the management of the properties and realisation of the assets has been instituted only on 6th April, 1959. Even the youngest of the three plaintiffs, the third plaintiff had become major in 1944 itself. The plaint sets out a family arrangement, sometime after 1932, consequential on the attack of the will as forgery whereby it is stated it was agreed that the first defendant should manage the properties of the deceased Rangaswami Naicker, collect the outstandings due to the estate, augment the income, account for the same and hand over possession of the properties and monies to the plaintiffs whenever demanded giving up his rights under the will set up by him.

Under the will Exhibit B-1 which vested all the properties of Rangaswami Naicker in the first defendant, certain obligations were imposed on him for the benefit of the three plaintiffs. At the time of his death the testator was possessed of about 42 acres of land and about Rs. 27,000 in outstandings. The will provides *inter alia* (*a*) that the first defendant should bring up at his expense the three plaintiffs till they attain majority; (*b*) that he shall get them married meeting the marriage expenses; (*c*) that each of the plaintiffs should be given Rs. 1,000 worth of jewels, two acres of well-irrigated lands and five acres of rain-fed lands and also a sum of Rs. 6,000 on their becoming majors; and (*d*) that a sum of Rs. 4,000 shall be spent on three charities, besides an endowment for the construction of a Vinayagar temple. The learned Subordinate Judge, on an analysis of the documentary evidence in the case and probabilities upheld the genuineness and truth of the will and found against the family arrangement put forward by the plaintiffs. He took up for consideration the alternative claim of the plaintiffs of seven acres of land for each of the plaintiffs and the cash of Rs. 6,000 for each of them. He found that the claim in respect of the lands had been satisfied by an arrangement which the first defendant put forward. He rejected the satisfaction pleaded by the first defendant in respect of the money claims of the plaintiffs and decreed a sum of Rs. 6,000 to each of the plaintiffs with interest at 5½ per cent. per annum from the dates of the plaintiffs attaining majority. The first defendant has preferred Appeal Suit No. 214 of 1961 to the extent of the decree against him and the plaintiffs have preferred Appeal Suit No. 462 of 1961 to the extent they have lost.

To take up for consideration the question of the genuineness of the will, we may immediately state that there cannot be the slightest doubt about the same. The first defendant has asserted rights under the will immediately after the death of the testator and had made the will public within a few days of the death when it became necessary to assert his rights under the will. To start with, viewed in

the background of the traditions, habits of life, thought and inclinations of the class of people to which the testator belonged, particularly at that period, with their robust outlook on life, there is nothing unnatural or unusual in the terms of the will.

[After discussing the facts of the case their Lordships proceeded to observe:]

In these circumstances, we see no reason to differ from the conclusion of the learned Subordinate Judge that the will Exhibit B-1, is a true, genuine and valid document which confers on the first defendant absolute title to the properties of the deceased subject to the provisions contained therein in favour of the plaintiffs and the trust.

We shall next take up for consideration the plea of family arrangement. The story of this family arrangement is set up for the first time in the notice Exhibit A-9, dated 18th February, 1959 which preceded the suit. The plaint is dated 4th April, 1959. The notice does not give the date of the arrangement. It is stated that it was brought about *sometime after* 1932. The reason for the family arrangement is stated to be the solicitude of the relations for the first defendant and to avoid the consequences that may follow a finding that the will was a forgery, ante-dated and fabricated by the first defendant. Under the arrangement the first defendant as the paternal uncle's son of the minors living in the same house should manage the properties of the plaintiffs, collect the outstandings due to their father, augment the income and account for the income and management and hand over to the plaintiffs when demanded possession of the properties and moneys thus taken charge of and augmented with full vouchers and accounts.

* * * * *

Having considered the entire evidence on this question and the probabilities, we have no hesitation in agreeing with the trial Court that the family arrangement is nothing but a myth to explain the long possession of the properties by the first defendant and the inordinate delay on the part of the plaintiffs in instituting the suit.

Next we shall take up for consideration the alternative claims of the plaintiffs in respect of the obligations that have been cast on the first defendant under the will-cash and lands as stridhanam.

* * * * *

The learned Subordinate Judge in these circumstances held that Exhibits B-74 and B-75 are fabrications and that the discharge pleaded is not true. No case has been made before us for differing from this conclusion.

The next question for consideration is whether the plaintiffs have been given by the first defendant lands as provided for in the will. The will provides that each of the daughters should be given two acres of well-irrigated lands and five acres of rain-fed lands as stridhana. The first defendant pleads that he has discharged this obligation also by giving for the plaintiff's use the land of an extent of thirty acres belonging to P.W. 3 which he purchased in Court auction.

* * * * *

In the circumstances we are unable to agree with the learned Subordinate Judge that the plaintiffs were given their share of the lands as directed under the will, Exhibit B-1.

The question however arises whether the claims of the plaintiffs in the alternative for the lands and the sum of Rs. 18,000 are in time. The testator died on 28th March, 1927. The first plaintiff became major in February, 1939, the second plaintiff in 1938 and the third plaintiff in August, 1944. It is contended for the defendants that under the will the lands and cash of Rs. 6,000 to each of the plaintiffs

had to be given as and when the plaintiffs attained majority, and that in the circumstances the claims are clearly barred. Learned Counsel contends that the proper article of limitation applicable is Article 123 of the Limitation Act of 1908. Under the said article a suit for legacy or for a share of residue bequeathed by a testator has to be instituted within 12 years after the legacy share becomes payable or deliverable. In the present case even the youngest of the daughters, the third plaintiff, had become major in August, 1944. For the plaintiff it was contended that the specific provision of the Limitation Act applicable is section 10 and not Article 123. The learned Subordinate Judge has accepted this contention and in our view, properly. No doubt for the application of section 10 the property must be vested in the first defendant as an express trustee. But once it is found that the person in possession fills the requirement, no period of limitation avails him. From a reading of the will Exhibit B-1 it is manifest that the first defendant is made an express trustee in respect of the obligations imposed under the will. The benefits conferred on the daughters by the will are not legacies simpliciter. All the properties of the testator are vested in the first defendant absolutely in ownership and certain obligations are imposed on him in relation to that ownership. He is enjoined by the will to get the daughter married, take care of them as guardian, give each of them a sum of Rs. 1,000 for jewels and also give each of them two acres of well-fed lands and 5 acres of rainfed lands, besides cash of Rs. 6,000 to each of them as stridhanam on their becoming majors. Clearly the properties of the testator are vested in the first defendant for certain specific purposes the essential elements required to attract section 10 of the Limitation Act. A person is an express trustee when he is entrusted by the owner with the properties for the discharge of particular obligations. This is not a case where the properties of the testator which have to go to the plaintiffs are vested in the first defendant merely by virtue of his office. The properties are vested in him in ownership subject to certain obligations. In the present case the properties are bequeathed to the first defendant upon trust to hand over some of the properties to the daughters of the testator at the appropriate time. In Williams on Executors and Administrators, Fourteenth Edition, Volume II, at page 774, it is stated:

> "If there is a specific bequest to the executor himself on trust, and he assents to it, the thing bequeathed thereupon ceases to be part of the testator's assets, and the executor becomes a trustee of it for those who are beneficially interested. He is thereupon precluded from dealing with it or making title as executor."

In *Vairavan Chetty* v. *Chettichi Achi*[1], where by a family arrangement a certain hundi was vested in the defendant for payment of debts of plaintiff's husband and any balance that might remain after payment of his creditors was to be paid to the latter, it was held that the arrangement constituted a trust for specific purposes within the meaning of section 10, and that the plaintiff's husband was entitled to call upon the defendant to account for the proceeds of the hundi. Varadachariar, J., observed in the course of the judgment:

> "In the view that the payment to Vellayappa himself (plaintiff's husband) of any balance that might remain after payment of his creditors was part of the arrangement under which the hundi was issued to the defendant, there can be little difficulty in holding that section 10 in Limitation Act covers the present suit. The section requires that the property should have become vested in the defendant in trust for a specific purpose. As the trust in the present case relates to money, the issue of the hundi in favour of the defendant was sufficient to vest the amount in him, and there is no doubt that a trust for the payment of the debts of Vellayappa and of the balance to Vellayappa himself will constitute a trust for a 'specific purpose'."

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1. A.I.R. 1936 Mad. 876, 877.

Reference may also be made to *Nachimuthu* v. *Muthuswamy*[1]. That is a case of settlement whereby the defendant's grandfather settled family properties worth about Rs. 15,000 upon his son and directed the son to pay to each of his three unmarried daughters of Rs. 500 in the shape of moveable properties on their attaining majority. The suit by the daughters claiming the sum of Rs. 500 was held not affected by any period of limitation; the son was held to be the trustee and the daughters, beneficiaries. *Narayanamurthy* v. *Gangaraju*[2], comes closer, as the trust in that case was created under a will. One Gangadaram deposited with his eldest son, the first defendant in the suit, a sum of Rs. 9,900 for investment and in relation to this fund he executed a will by and under which the first defendant was directed to pay interest accruing on the amount to his wife. After her death the money was to be taken by the first defendant and his brothers. A dispute arose as to the arrears of interest accrued and undisbursed before the death of the testator's wife. A claim for the said amount was made by the stridhana heirs of the wife. Referring to section 10 in answer to the plea of limitation it is observed by Chandra Reddy, J. (as he then was):

> "Undeniably, Gangadharam entrusted the sum of Rs. 9,900 for the specific purpose of investment, the interest accruing whereon was to be paid to his wife. For that reason the money can be said to have become vested in the first defendant in trust for the express purpose of payment of the accruing interest to his mother."

In our view, the plea of limitation set up in defence to the alternative claim has to fail.

We shall now consider what reliefs the plaintiffs are entitled to. The trial Court has awarded interest on the sum of Rs. 6,000 from the dates on which the respective plaintiffs attained majority. In our view, in the circumstances of the case, the plaintiffs will not be entitled to interest for any period prior to the date of the plaint. Even in the notice, dated 18th February, 1959, which preceded the suit, the alternative claim for the moneys and lands was not made. It is the plaintiff's own case that the parties have all been living together and disputes arose only shortly before the suit. No doubt the first defendant would deny that the plaintiffs were all living with him jointly. One thing is clear from the evidence that even P.W. 3 the first plaintiff's husband, had been writing for a long time the accounts of the first defendant. Very likely a reason for the absence of demand may be that the parties have been getting on amicably together having the benefit of common management whether there was common living or not. There is evidence on record showing complete amity between the parties after the early skirmishes by the guardians and that the plaintiffs have been looking upon the first defendant as a brother and have been so referring to him. To sustain the claims and counter claims that have been set up in the suit, the true relationships of the parties have obviously been suppressed. In our view, interests of justice would be served sufficiently if the plaintiffs are awarded interest on the three sums of Rs. 6,000 from 6th April, 1959, the date of the institution of the suit. The decree of the trial Court in this regard will be modified to this extent. As regards the plaintiffs' claim for lands, the defendants shall place each of the plaintiffs in possession of two acres of well-irrigated and five acres of rainfed lands from out of the lands owned by their father Rangaswami Naicker at the time of his death and described in the schedule to the plaint. If the parties are not agreed as to the particular lands which each of the plaintiffs has to take, the matter shall be determined in execution proceedings. The plaintiffs shall be entitled to mesne profits from the lands from 6th April, 1959. As both the appeals succeed in part and fail in part, the parties will bear the respective costs in the appeals. As regards costs in the trial Court, the parties will give and take proportionate costs.

V.M.K. ——— *Ordered accordingly.*

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1. A.I.R. 1934 Mad. 273.
2. (1958) 2 An.W.R. 312 : A.I.R. 1958 A.P. 451, 454.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

Errachi Reddiar and another .. *Appellants**

v.

Vellayya Reddiar .. *Respondent.*

Madras Indebted Agriculturists Relief Act (I of 1955), *section* 7 *and Transfer of Property Act (IV of* 1882), *section* 53 (1)—*Sale of suit property pending an attachment—Presumption under section* 7—*Intention to defraud the creditors—Presumption, rebuttable—Burden of proof—Evidence.*

The plaintiffs purchased the suit property from the widow of the judgment-debtor pending an attachment. They are creditors of the agriculturist debtor and out of the consideration of Rs. 2,000, Rs. 1,900 was in discharge of debts due to them and only Rs. 100 was paid in cash to the judgment-debtor's widow. Section 7 of Madras Act (I of 1955) raises a presumption that every transfer of immoveable property made by the debtor entitled to the benefits of the Act till the complete discharge of his debt shall be presumed, until the contrary is proved, to have been made with intent to defeat or delay the creditors of the transferor. Section 53 (1) of the Transfer of Property Act specifically provides that nothing in the sub-section shall impair the rights of a transferee in good faith and for consideration. The plaintiffs in this case have pleaded that they are transferees in good faith and for consideration and they have let in evidence on this aspect of their case. The lower appellate Court's finding was that since the widow has retained the 100 rupees for herself and has not utilised it to discharge the debts due to her husband's creditor, the sale is in fraud of creditors of the deceased.

Held : Under the Transfer of Property Act, the onus of proof when a transfer is alleged to be in fraud of creditors, is left to the general law of evidence. Section 7 of the Act (I of 1955) does not make every transfer of immoveable property made by an agriculturist debtor pending the moratorium period, a transfer in fraud of creditors. It only raises a presumption in favour of the attaching creditor. It is a rebuttable presumption. If the evidence let in warrants the inference having due regard to the burden that the transferor could not have in making the transfer intended to defeat or delay creditors, the transaction has to be upheld and cannot be impugned. Again the transfer may stand established as a case of preference of one creditor. On the other hand, if the transferor has other properties available for meeting the demands of his creditors, an inference to defeat the creditors by sale of a single item is rebutted. The mere fact that the cash has been received by the judgment-debtor cannot vitiate the transfer in all cases. The present case is not a case where it can be said that there was no evidence for the plaintiff which could be considered in rebuttal of the statutory presumption. There is evidence on record. But they have not been adverted to or considered by the Courts below. In the circumstances, the lower Courts not having examined the case of the plaintiffs from the proper angle, the finding that the sale is vitiated under section 7 of Act (I of 1955) read with section 53 of the Transfer of Property Act has to be set aside.

Appeal against the decree of the District Court, Tiruchirapalli in A.S. No. 381 of 1962 preferred against O.S. No. 679 of 1959, District Munsif Court, Kulitalai.

V. Vedantachari and *R. K. Tatachari*, for Appellants.

K. S. Champakesa Iyengar for *R. T. Gopalakrishnan*, for Respondent.

The Court made the following

ORDER.—The plaintiffs, who have failed in both the Courts below, are the appellants in this second appeal. The claim relates to the plaintiff's title and right

*S.A. No. 698 of 1967. • 30th March, 1967.

to possession of the suit land, an extent of 3.47 cents of punja in survey field No. 162/1-B, Chinnareddipatti Village, hamlet of Porundlur, Kulitalai Taluk, Tiruchirapalli District. They prayed for the relief of declaration of their title and for a permanent injunction restraining the defendant, from interfering with their possession, claiming in the alternative possession, if the Court should find that the plaintiffs are not in possession. The suit land admittedly belonged to one Lavunga Reddi against whom his creditor one Kandan Chetti (D.W. 1) filed the suit O.S. No. 362 of 1950 on the file of the District Munsif Court, Kulitalai, for the recovery of a sum of Rs. 1,454, for principal and interest due on promissory notes. Kandan Chetti obtained an attachment before judgment of the several properties belonging to Lavunga Reddi including the suit property on 16th July, 1950 and on 23rd August, 1950 the attachment was made absolute. A decree was given in the suit on 30th January, 1951 and the first execution petition E.P. No. 214 of 1953 was field on 6th April, 1953 seeking execution of the decree by sale of the suit properties and other properties that had been attached before judgment. Pending the execution, the judgment-debtor Lavunga Reddi died and his widow Pappathiammal was brought on record as legal representative and execution continued. At the sale held on 25th November, 1963, there were no bidders and the execution was adjourned for 'steps' in a week. Twelve items of properties had been attached before judgment and were sought to be proceeded against in execution. While the sale thus stood adjourned on 5th December, 1953, the Madras Indebted Agriculturists (Temporary Relief) Ordinance (V of 1953) came to be made. On 7th December, 1953, the execution petition was closed with the following observations: "No steps taken. Petition closed. Attachment to continue for two months." Clearly the plaintiffs, the decree-holders, could take no steps then. The Act applied to the debt in question and in the Courts below, it was not seriously disputed that the execution petition came to be closed because of the coming into force of Ordinance (V of 1953). Now, meanwhile on 30th November, 1953, the plaintiffs purchased the suit land and certain other properties from the judgment-debtor's widow Pappathiammal *alias* Narayi under Exhibit A-1 for a consideration of Rs. 2,000. Rs. 1,900 out of this consideration went in discharge of debts due to the second plaintiff by Lavunga Reddi, the deceased, as evidenced by promissory notes. The balance of Rs. 100 alone was taken in cash by the widow for her family expenses. It may be stated that both the Courts below find that the consideration for the sale deed passed in the manner above set out and sale was fully supported by consideration. Except for the sum of Rs. 100 the sale was in discharge of the debts due by the deceased judgment-debtor and only a cash of Rs. 100 passed under the transaction to the judgment-debtor's widow as the vendor. Kandan Chetti, the decree-holder in O.S. No. 362 of 1950 after the period of the ban imposed under the Ordinance (V of 1953), followed up by Madras Act (V of 1954) and Act (I of 1955), continued the execution re-attaching the properties and bringing them to sale. The respondent herein, the defendant in the suit, out of which this second appeal arises, purchased the suit property in Court auction on 30th January, 1957 in E.P. No. 377 of 1955. The sale was duly confirmed and Exhibit B-8, dated 29th March, 1957 is the sale certificate issued in favour of the defendant. The defendant proceeded to take delivery of the suit property in execution of his decree and Exhibit B-11 is the delivery receipt for delivery of the property in execution on 30th July, 1957. The plaintiffs live about 12 miles away from the suit land and it is their case that they were not aware of the alleged attachment or the auction proceedings taken by the decree-holder Kandan Chetti. It is stated for them that they became aware of the auction sale just before suit and they filed the suit on 30th November, 1959. Admittedly there was no claim on the attachment or any recorded obstruction to the delivery. The question for determination in the circumstances is as to the title to the properties.

The plaintiffs' purchase was pending an attachment. There had been an attachment before judgment and in E.P. No. 214 of 1953, execution was sought by sale of the properties referring to the attachment before judgment, which had become

absolute on 30th November, 1953. On 7th December, 1953, the Court had while closing the execution petition directed that the attachment should continue for two months, that is, the attachment in terms of the order would expire on 6th February, 1954. The execution petition E.P. No. 377 of 1955 under which the sale of the suit property was held was filed on 14th September, 1955 and there was attachment of the immoveables thereunder on 19th October, 1955. The suit property was purchased by the defendant in this E.P. on 30th January, 1957 for a sum of Rs. 500. The plaintiffs had purchased the same property with some other properties on 30th November, 1953 for the sum of Rs. 2,000. *Ex facie*, the attachment pending which the property was purchased by the plaintiffs had ceased in February, 1954. and the defendant's purchase was under an attachment made in 1955. It is contended for the plaintiffs that they were *bona fide* purchasers of the property for valuable consideration unaware of the involved circumstances of their vendor's husband, nearly, the entirety of the consideration went in discharge of debts due to them and there was nothing fraudulent about the transfer in their favour. They contended that section 64, Civil Procedure Code cannot help the defendant in this case, as his sale is under a different attachment and the original attachment had ceased in February, 1954 itself. The defendant sought to maintain his title to the property under two heads. It was contended that the sale was subsequent to 1st October, 1953, and was hit by the Ordinance and Acts, above referred to. It was a sale in fraud of creditors by an agriculturist debtor. Secondly it was contended that the original attachment in this case was an attachment before judgment and notwithstanding the order made by the Court on 7th December, 1953, when closing the execution that the attachment was to continue for two months, the attachment in law had continued right through. Learned Counsel contends that an attachment before judgment, unless it be a case of dismissal of the execution petition for default on the part of the decree-holder, would continue to subsist till discharge of the decree by sale of the properties. The Courts below have found for the defendant under both the heads and have dismissed the suit negativing the itle of the plaintiffs to the property.

Mr. Vedantachari, for the plaintiffs, the appellants in the Second Appeal, attaked the decision of the Courts below as unsound and untenable under both the heads. For his contention, that the order closing the execution petition having specifically provided the period during which alone the attachment was to subsist, notwithstanding the fact that the original attachment was an attachment before judgment the attachment had ceased with the expiry of the period specified, learned Counsel relied on the decision in *Kuppuswami* v. *Rangai Goundan*[1]. The decision does clearly support the learned Counsel for the appellants. However Mr. K.S. Champatkesa Aiyangar for the defendant strenuously contends that when the dismissal of the execution petition is not for any default on the part of the decree-holder it can never cease till sale or satisfaction of the decree and that was the position in law on the authorities, notwithstanding an order of Court fixing a time-limit for the subsistence of the attachment. The contention raised by the learned Counsel for the respondent, whom I have heard for sometime, I find, requires, careful consideration. In the view, I take of the other head of defence, I do not propose to go into this question at this stage.

The other head of defence, that the sale is in fraud of creditors and voidable under section 53 of the Transfer of Property. Act is normally a question of fact. But unfortunately, the Courts below and particularly the lower appellate Court, the final Court of fact, had failed to address themselves to material evidence on record in regard to the essential ingredients for holding a transfer as fraudulent, that is a transfer made with intent to defeat or delay creditors. Reference is made by the Courts below to section 7 of Madras Act (I of 1955), which raises a presumption that every transfer of immoveable property made by the debtor entitled to the benefits of the Act till the complete discharge of his debt shall be presumed until the contrary

1. (1962) 2 M.L.J. 132: A.I.R. 1962 Mad. 383.

is proved to have been made with intent to defeat or delay the creditors of the transferor. But the plaintiffs have pleaded that they are transferees in good faith and for consideration and they have let in evidence on this aspect of their case. Section 53 (1) specifically provides that nothing in the sub-section shall impair the rights of a transferee in good faith and for consideration. The plaintiffs are themselves creditors of the agriculturist debtor and out of the consideration of Rs. 2,000, Rs. 1,900 was in discharge of debts due to them and only Rs. 100 was paid in cash. The lower Courts for their conclusion would make reference to the decision of this Court in *Abdul Majeed Labbai* v. *Pappathiammal*[1]. They failed to appreciate that it was a case where on the facts the transferee appeared to have shared the fraudulent intent of the transferor. The learned District Judge, after referring to the above case, simply remarks thus :

"In the present case under Exhibit A-1, the vendor had received Rs. 100. She has retained this amount for herself. She has not utilised it to discharge the debts due to her husband's creditor".

With these observations, it was held that the case immediately cited above applied and that the sale Exhibit A-1 is in fraud of creditors of the deceased.

Now section 7 of the Act I of 1955 does not make every transfer of immoveable property made by an agriculturist debtor pending the moratorium period, a transfer in fraud of creditors. It only raises a presumption in favour of the attaching creditor. The presumption is a rebuttable presumption. It contemplates transfers being validly made and does not prohibit transfers in general during the period. If the presumption stands unrebutted, then the consequences found in section 53 of the Transfer of Property Act follow. The sale is voidable by the creditors. The effect of section 7 is to throw the burden under section 53 of the Transfer of Property Act, effectively on the transferor and the transferee. If notwithstanding the presumption that is raised in favour of the creditor by reason of section 7 the transferee establishes that he is a transferee in good faith and for consideration, his transfer cannot be avoided. Again section 7 only raises a presumption that a transfer has been made with intent to defraud or delay creditors of the transferors. If the evidence let in warrants the inference having due regard to the burden that the transferor could not have in making the transfer intended to defeat or delay creditors, the transaction has to be upheld and cannot be impugned. Again the transfer may stand established as a case of preference of one creditor. In all these cases the presumption would stand rebutted. Under the Transfer of Property Act, the onus of proof when a transfer is alleged to be in fraud of creditors, is left to the general law of evidence. The effect of section 7 of Act (I of 1955) is only to indicate the burden and place it squarely on the transferee. For a transfer to fall under section 53 of the Transfer of Property Act, the intention must be to defeat or delay creditors generally and not preference of one creditor to another. The transfer must be one which removes the property from the creditors to the benefit of the debtor. The intention is the transfer should not be for the debtor to reserve a benefit to himself. If the debtor sells property to another creditor in discharge of debts due to him, but it is found that the price realised is considerably in excess of the debt to be discharged, it will be a fair inference that there was an intention to defraud creditors while preferring one. As one of the essential ingredients for invalidating a transfer under section 53 of the Transfer of Property Act is a fraudulent intention to defeat or delay creditors, the intention has to be found. A man is presumed to intend the natural and normal consequence of his acts. The intention with reference to a particular act must be judged only from the consequences of the act in the back ground of the surrounding circumstances. If the effect of a sale is necessarily to leave in the hands of the transferor a large amount of cash, which could have been avoided by sale of lesser extent, an inference of fraudulent intent may follow. Equally, if the cash left

1. (1961) 1 M.L.J. 235.

in the hands of the vendor is unsubstantial and could not have been avoided having regard to the property available for sale and the sale is a prudent one, fraudulent intent is not a necessary deduction from the mere fact that the transferor had received some cash. Again in all these cases for section 53 of the Transfer of Property Act to apply, the transferee must share the fraudulent intent. He must help the transferor in his intention of securing the cash to himself to the detriment of other creditors. The question essentially is a matter for inference from all the circumstances of the case ; but for a finding in its regard to have a finality as a finding of fact the Court of fact must bear in mind the ingredients that are required to initiate a transfer under the provision. If the transferor has other properties available for meeting the demands of his creditors, an inference to defeat the creditors by sale of a single item is rebutted. I shall give another illustration where the mere fact that some cash is received by the transferor cannot vitiate the transfer. Suppose there is an item of property worth one lakh of rupees, the debtor may have other items of properties and when he is involved in debts, a creditor to whom Rs. 90,000 is due, presses for the discharge of his debt and to avoid Court auction and the consequential heavy litigation costs, the debtor sells the item of property for one lakh. It is a proper and fair price and the debtor receives Rs. 10,000 in hand, the obligation being his to bear the stamp, registration and legal charges in regard to the transaction. True, the sum of Rs. 10,000 which he receives in cash he receives it for his benefit. He receives it to meet his obligation of completing the sale by a duly registered instrument. He certainly gets the benefit of the cash received in this way. Can it be said in this case that because he had received a sum of Rs. 10,000 in cash and that is a benefit to him the sale was in fraud of creditors ? The intention of the transfer is to pay off the creditor. The property could not be sold for less or more. Here the transferor's object in receiving the cash was not to benefit himself at the expense of his creditors. May be that the entire sum of Rs. 10,000 may not get utilised in legal charges. A sum of Rs. 500 or Rs. 1,000 may be left in his hands at the close of the transaction. Are we to say in such a case that the transfer is with intent to defraud creditors and that the transferee has shared the transferor's intent and helped him to defeat and delay creditors? This is an extreme case, but I am giving it as an illustration to point out that each case has to be decided on its own facts, having regard to all the surrounding circumstances. Mere receipt of some cash without more cannot vitiate a transfer. To do a thing with intent is to do it having the mind or attention firmly directed or fixed on the thing. When we speak of intention, we mean the fixed direction of the mind towards a particular object a determination to do a specified thing or to act in a particular manner. The ultimate object or purpose of an act is the intention. The Courts below have failed to examine the present case in the light of the above principles. They simply proceeded to apply the decision of this Court in *Abdul Majid* v. *Pappathi Ammal*,[1] without adverting to the facts of that case and examining the facts of the present case. In that case not only did the transferor retain some cash under the transaction, but as pointed out by Ramakrishnan, J., in *Chinnia Padayachi* v. *Abdul Jalil Rowther*[2], it would appear from the judgment that the transferor was not shown to have possessed any property other than the alienated property. Also, it was a case where the transferee appears to have shared the fraudulent intent of the transferor. That case is clearly distinguishable on facts. In the circumstances, the lower Courts not having examined the case of the plaintiffs from the proper angle, the finding that the sale is vitiated under section 7 of Act (I of 1955) read with section 53 of the Transfer of Property Act has to be set aside. Before it could be found that the plaintiffs are barred from relying on the sale in their favour, it must be found that they had failed to discharge the burden on them of establishing that they are transferees in good faith and for consideration. It must be found that they have failed to establish their *bona fides* that they were not aware of the involved circumstances of the transferor and that they had not shared the fraudulent intent, if any, of the transferor. And it

1. (1961) 1 M.L.J. 235.
2. S.A. No. 317 of 1961.